No. 99-1953-CFX Title: District of Columbia, et al., Petitioners
v.
Tri County Industries, Inc.

Docketed: June 6, 2000 Court: United States Court of Appeals for the District of Columbia Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Jun 2 2000 | Petition for writ of certiorari filed. (Response due July 6, 2000) |
| | Jun 7 2000 | Waiver of right of respondent TRI County Industries, Inc. to respond filed. |
| | Jun 13 2000 | DISTRIBUTED for Conference of June 28, 2000 |
| | Jun 22 2000 | Response requested. |
| | Jul 19 2000 | Brief of respondent Tri County Industries, Inc. in opposition filed. |
| | Jul 31 2000 | Reply brief of petitioners District of Columbia, et al. filed. |
| | Aug 2 2000 | REDISTRIBUTED for Conference of September 25, 2000 |
| | Sep 26 2000 | Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29. 2000. Rule 29.2 does not apply.<br>SET FOR ARGUMENT January 10, 2001.<br>********** |
| | Nov 3 2000 | Record filed. |
| | Nov 13 2000 | Joint appendix filed. |
| | Nov 13 2000 | Brief of petitioners District of Columbia, et al. filed. |
| | Nov 13 2000 | LODGING consisting of twenty bound tan covered sets of exhibits submitted by counsel for the petitioners and distributed. |
| | Nov 20 2000 | Record filed. |
| | Dec 8 2000 | CIRCULATED. |
| | Dec 13 2000 | Brief of respondent Tri County Industries, Inc. filed. |
| | Dec 13 2000 | Brief amicus curiae of Association of Trial Lawyers of America filed. |
| | Dec 22 2000 | Record filed. |
| | Dec 29 2000 | Reply brief of petitioners Dist. of Columbia, et al. filed. |
| | Jan 10 2001 | ARGUED. |
| | Jan 17 2001 | Writ of certiorari DISMISSED as improvidently granted. PER CURIAM. |

Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

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DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
v.
TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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51 pp

## QUESTION PRESENTED

*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), holds that the Seventh Amendment does not preclude district courts from exercising substantial discretion in granting new trials but does constrain appellate review of such orders. The question presented is whether, as some Circuits have recognized, *Gasperini* invalidates the contrary approach of other Circuits, including the D.C. Circuit here, which hold that the Seventh Amendment strictly circumscribes a district court's discretion to grant a new trial and thereby expands the scope of appellate review.

## PARTIES

The parties are Tri County Industries, Inc.; District of Columbia; Mayor Anthony Williams (as successor to Sharon Pratt Kelly); the District of Columbia Department of Consumer and Regulatory Affairs; the Director of the District of Columbia Department of Consumer and Regulatory Affairs, Lloyd J. Jordan (as successor to Hampton Cross); and Ted Gordon, Senior Deputy Director for Health Assurance, the District of Columbia Department of Health (as successor to Ferial Bishop, Administrator of the Environmental Regulation Administration of the District of Columbia Department of Consumer and Regulatory Affairs). Tri County Industries has represented that it is a privately owned corporation organized under the laws of Maryland; primarily engages in the business of removing underground fuel storage tanks and contaminated soil; and does not have any parent companies, subsidiaries or affiliates that issue shares or debt securities to the public.



## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . i
PARTIES . . . . . ii
TABLE OF AUTHORITIES . . . . . iv
OPINIONS BELOW . . . . . 1
JURISDICTION . . . . . 1
LEGAL PROVISIONS INVOLVED . . . . . 2
STATEMENT OF THE CASE . . . . . 2

I. INTRODUCTION . . . . . 2
II. THE FACTS . . . . . 3
III. THE LITIGATION . . . . . 6

A. Preliminary Matters . . . . . 6
B. The First Trial . . . . . 6
C. The District's Motion For A New Trial . . . . 8
D. The District Court's New Trial Order . . . . . 9
E. The Second Trial . . . . . 10
F. The D.C. Circuit's Decision . . . . . 11
G. Rehearing Denied . . . . . 13

REASONS FOR GRANTING THE WRIT . . . . . 14

I. THE D.C. CIRCUIT'S STANDARD FOR REVIEWING ORDERS GRANTING NEW TRIALS CONFLICTS WITH THIS COURT'S DECISION IN *GASPERINI* . . . . . 15

A. *GASPERINI* . . . . . 15
B. The D.C. Circuit's Conflicting Approach . . . . 18

II. UNLESS *GASPERINI* IS APPLIED TO RESOLVE IT, THERE IS AN INTOLERABLE CONFLICT AMONG THE CIRCUITS OVER THE STANDARD TO BE APPLIED TO APPELLATE REVIEW OF NEW TRIAL ORDERS . . . . 23

CONCLUSION . . . . . 26

APPENDIX

Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (Jan. 18, 2000) . . . . . 1

Judgment on the Verdict in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. Apr. 20, 1998) . . . . . 11

Memorandum Order in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. Jul. 23, 1998) . . . . . 12

Judgment on the Verdict in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. Feb. 4, 1999) . . . . . 15

Order of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (Mar. 8, 2000), denying petition for rehearing . . . 16

Order of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (Mar. 8, 2000), denying petition for rehearing *en banc* . . . . 17



## TABLE OF AUTHORITIES

### CASES

*Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) . . . . . 16, 20
*Blunt v. Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (C.C. Mass. 1822) . . . . . 17
*Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999) . . . . . 24
*Bright v. Eynon*, 1 Burr. 390, 393 (K.B. 1757) . . . . . 17
*Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958) . . . . . 17
*Carey v. Piphus*, 435 U.S. 247 (1978) . . . . . 3, 6, 9, 10
*Central Office Tel., Inc. v. American Tel. and Tel. Co.*, 108 F.3d 981 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998) . . . . . 16, 25
*Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2 (2d Cir. 1996) . . . . . 25
*Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2d Cir. (1961) . . . . . 16, 18, 19
*Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977) (*per curiam*) . . . . . 18
*Eastern Air Lines, Inc. v. Union Trust Co.*, 239 F.2d 25 (D.C. Cir.), *cert. denied*, 353 U.S. 942 (1956) . . 11
*Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) . . . . . 24
*Gasperini v. Center for Humanities*, Inc., 66 F.3d 427 (2d Cir. 1995), *vacated and remanded*, 518 U.S. 415 (1996) . . . . . 18
*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*
*Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987) . . . . . 25

*Holmes v. Massillon, Ohio*, 78 F.3d 1041 (6th Cir.), *cert. denied sub nom., Fabianich v. Holmes*, 519 U.S. 935 (1996) . . . . . 24
*Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992) . . . . . 12, 24
*Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied sub nom., Combustion Eng'g, Inc. v. McGill*, 120 S. Ct. 329 (1999) . . 17, 25
*Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997) . . . . . 12, 14, 21
*Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.) (*en banc*), *cert. denied*, 364 U.S. 835 (1960) . . 24, 25
*McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124 (7th Cir. 1998) . . . . . 24
*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988) . . . . . 11, 22
*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) . . . . . 15, 23
*Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982) . . . . . 11
*Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C.Cir.), *cert. denied*, 396 U.S. 835 (1969) 18, 19
*Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997) . . . . . 2, 6, 19
*Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350 (3rd Cir. 1998) . . . . . 24

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. CONST. Amend. VII . . . . . *passim*
28 U.S.C. § 1254(1) . . . . . 1

**MISCELLANEOUS**

Fed. R. Civ. P. 59(a) . . . . . 2
6A Moore's Federal Practice ¶59.05[2] (2d ed. 1996) . 17
11 Wright & Miller, Federal Practice and Procedure, §§ 2805 and 2819 (1973) . . . . . 25



**DISTRICT OF COLUMBIA, *ET AL.*,**
***Petitioners,***

**v.**

**TRI COUNTY INDUSTRIES, INC.,**
***Respondent.***

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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The District of Columbia, *et al.*, petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The January 18, 2000, decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1-10) is reported at 200 F.3d 836; 2000 U.S. App. LEXIS 624; and 50 ERC (BNA) 1249. The July 23, 1998, decision of the United States District Court for the District of Columbia (App. 12-14) is not reported.

## JURISDICTION

The D.C. Circuit issued its decision on January 18, 2000. App. 1. On February 17, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. App. 16 & 17. The petition and suggestion were denied on March 8, 2000. App. 16 & 17.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## LEGAL PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution (U.S. CONST. Amend. VII), which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This case also involves Fed. R. Civ. P. 59(a), which provides in pertinent part:

> A new trial may be granted as to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

## STATEMENT OF THE CASE

### I. INTRODUCTION.

This appeal involves the award of damages for a procedural due process violation -- the suspension, without a prior hearing, of a permit to construct a soil remediation facility in the District of Columbia. *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460-62 (D.C. Cir. 1997). On remand from that appeal, the case was tried to a jury which awarded $5,000,000 in damages. Following the award, the district court, the Honorable James Robertson, ordered a



new trial because the damages award was excessive and he had disabled the jury from performing its job by excluding and striking evidence from its consideration. A second jury, which considered a fuller evidentiary record in light of *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978), and the rule that a party must mitigate its damages arising from an unlawful injury, awarded nominal damages of $100.

On appeal, citing Seventh Amendment concerns, the D.C. Circuit transformed an abuse of discretion standard of appellate review into a "more searching inquiry" standard. App. 5 & 10. Under that revised standard, the court set aside the district court's order granting the District of Columbia a new trial. We submit that in doing so, the D.C. Circuit contravened this Court's teaching in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *Gasperini* holds that district court judges retain substantial discretion under the Seventh Amendment to order new trials and that appellate courts must exercise restraint in applying the abuse of discretion standard of appellate review of new trial orders. The decision here turns *Gasperini* on its head.

### II. THE FACTS.[1]

Tri County's history in the District of Columbia has been a history of ignoring public health and safety. In the early 1990's, Tri County first entered the soil remediation market by opening a processing facility on New York Avenue, N.E. SA529-30 & SA534. The facility was closed both because Tri County did not have a certificate of occupancy and because it violated the District's zoning laws. SA533-34.

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[1]References to the record below are as follows: "A" (Appendix filed in the D.C. Circuit); "SA" (Supplemental Appendix filed in the D.C. Circuit); and "T" (Trial Transcript).

In 1993, Tri County secured a building permit to construct a soil remediation facility several blocks away. SA457 (Pl. Exh. 5). Some five months later, Tri County began to accept delivery of contaminated soil, although it had not yet secured a certificate of occupancy. On September 2, 1993, a veteran zoning inspector from the District's Department of Consumer and Regulatory Affairs ("DCRA") inspected the facility. SA570-71. The gate to the premises was open; it had no lock. There was no security gate for the facility; and a door was open. No one was there. The inspector went into one of the big rooms in the building where he saw lots of "rotten soil." SA572. The soil "had a terrible smell" and "it was so bad" that it "irritated" his eyes. SA572. He wrote a Notice of Infraction for storing contaminated soil without a certificate of occupancy. SA423 (Def. Exh. 1); SA570-74.

Tri County did not respond to this Notice even though the Notice advised that Tri County would "be subject to the maximum penalties permitted by law, *suspension of your license/permit*, . . . and/or sealing of your business," and that the fine would double if not paid within 15 days. SA423 (emphasis added). Tri County continued to accept tons and tons of contaminated soil. SA434-35; SA526-27.

On September 22, 15 days after service of the Infraction Notice, the DCRA dispatched a construction inspector to the facility. SA576-77. The inspector saw that Tri County was "storing . . . a whole lot of dirt." SA577. The Tri County representative could not produce a permit or a certificate of occupancy. SA577-78. The inspector issued a stop work order. A391-92; SA578.

The DCRA's Office of Adjudication scheduled a hearing on the Infraction Notice for October 13. SA425. Tri County defaulted. An Administrative Law Judge found it guilty,



based on the testimony of the inspector who had issued the Notice, and added to the original $500 fine a $1,000 penalty and $25 in costs. SA426-27 (Def. Exh. 2). The decision stated that failure to appeal "or to arrange for payment of all fines, penalties, and costs within fifteen (15) days of service of this decision ***SHALL OPERATE TO SUSPEND AUTOMATICALLY THE LICENSE OR PERMIT.***" SA427 (emphasis in decision). Tri County neither appealed nor arranged for payment.

In the meantime, on September 20, Tri County attended a community meeting about the facility. At this meeting, Hampton Cross, DCRA's Acting Director, suspended Tri County's building permit because he had been informed (mistakenly, as it turned out) that this facility was going to be very close to a proposed housing development. App. 3.

The DCRA's Environmental Regulation Administration ("ERA") followed up on Mr. Cross's temporary suspension. On October 15, it sent a letter to Tri County, referencing the community meeting and the (mis)information about the proposed housing development. A394-95 (Def. Exh. 11). Given that information, the ERA had determined that "further review is necessary" pursuant to the District's Environmental Policy Act of 1989. A394. The letter requested information about ten matters, including the precise distance of the facility from nearby residences and from the property which Mr. Cross mistakenly believed was to be developed. A394-95.

Tri County did not answer this letter. A292. Instead, its President, Glenn Selzer, called to inform the District that he had already provided the information in Tri County's application. A291-94. Shortly thereafter, in November, Tri County abandoned the project. A72.

On December 6, 1993, Mr. Cross, unaware of Tri County's decision, sent it a letter. A396 (Def. Exh. 12). Citing its failure to respond to the October 15 letter, he rescinded the DCRA's environmental approval of the project. A396-97. This letter also cited Tri County's misrepresentation of the distance of its proposed facility to nearby residences, less than 100 feet as opposed to more than 700 feet. A396.

## III. THE LITIGATION.

### A. Preliminary Matters.

On September 20, 1994, Tri County brought suit in U.S. District Court claiming, *inter alia*, that Mr. Cross's oral suspension of its permit on September 20, 1993, violated the Due Process Clause of the Fifth Amendment. The D.C. Circuit agreed and remanded the case "to consider the extent of Tri County's damages." *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d at 462. In its decision, the court observed that "Tri County took no action to challenge either the September 20 suspension, which all parties now agree had no legal basis at all, or the [September 22] stop work order, which is not challenged here and which all agree was a legally sufficient bar to Tri County's continuing work on the facility." *Id.* at 457. It also directed that, "[i]n calculating any damages, . . . the possibility of relief from the District's Board of Appeals and Review, as well as the possible mooting effect of the stop work order, may be pertinent." *Id.* at 462.

### B. The First Trial.

At a four-day trial in 1998, Tri County sought more than $11,000,000 in damages, mostly for lost future profits. In opposition, the District made two basic *Carey v. Piphus*



arguments: (1) all or some of Tri County's damages following Mr. Cross's procedurally deficient suspension of Tri County's permit on September 20 would have occurred nevertheless because of events independent of the suspension (*i.e.*, the stop work order issued two days later; the automatic suspension of Tri County's building permit following Tri County's default on the early September Notice of Infraction; and other regulatory health and safety hurdles); and (2) Tri County had failed to mitigate, or to avoid, avoidable damages arising from the District's failure to afford it an opportunity to be heard prior to Mr. Cross's suspension.

In support of the first argument, the District called an District environmental specialist, who testified, *inter alia*, that the distance of Tri County's plant from residences was much less than Tri County had represented in its application. See A188; T. 419-32 & 442-46. In addition, the District unsuccessfully proffered Dr. Alfred A. Siess to demonstrate that Tri County's proposed plant was unsafe. See SA492-506. In support of the second argument, the District, *inter alia*, introduced "the two letters from the District of Columbia government to Tri County, October 15 and December 6, 1993, asking for follow-up information and informing them that they would be suspended if they didn't give that information." A188. Mr. Cross testified that the October 15 letter was sent to Tri County "*to establish a process which would afford -- which would resolve the issues that had arisen*, to establish a process and to get the necessary information from Tri County." SA485 (emphasis added).

Importantly, before sending the case to the jury, the court struck "*all of the testimony . . . on the health and safety aspects of this project*" because it had determined "that *the permitting process fully considered those issues and resolved*

*them*." A189 (emphasis added).[2] The evidence stricken included much of the testimony of the District's environmental specialist and of Mr. Cross. See T. 389-99; SA488-90. See also T. 315-18 (certificate of occupancy conditions); App. 3 n.1 (certificate of occupancy requirements). In addition, the court struck the District's October 13 invitation to be heard, as well as the December 6 letter suspending Tri County's project for failing to respond to the October 13 letter.

On this truncated evidentiary record, the jury awarded $5,000,000.

**C. The District's Motion For A New Trial.**

In its post-trial motion seeking a new trial (Docket Entry ("DE") 115), the District argued that the damages award was grossly excessive and speculative. Given Tri County's total failure to mitigate and its speculative projections of future profits, the damages award was grossly excessive. The District urged: "Tri County made no effort to avert the damages they assert, not even the preparation of a response to the two page, October 15, 1993 letter . . .." DE 115 at 19-20; see also DE 115 at 6 & 11.

The District also argued that the court's evidentiary rulings precluded the jury from performing its job. The court had wrongly excluded the District's post-suspension invitation to Tri County to be heard and Tri County's failure to respond to that invitation. The court had also wrongly excluded health and safety evidence: "Although plaintiffs retained the burden of establishing their right to more than nominal damages,

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[2]However, the permit required Tri County to comply with District laws and subjected it to numerous reviews, reporting requirements, and conditions. SA422; 429-30.



resolution of that right under *Carey v. Piphus* depended on the credibility of conflicting witnesses and the jury's evaluation of the evidence regarding the impact that the project would have [had] on the health, safety and welfare of the community . . . evidence . . . essential to defendants[']' case that the project would have been halted anyway." DE 115 at 24.

**D. The District Court's New Trial Order.**

The district court granted a new trial for several reasons. First, although Tri County could be excused from expending considerable sums of money to protect its investment of under $500,000 in the project, the court ruled "unreasonable *per se*" Tri County's position that it was entitled to some $11,000,000 in future profits "without investing a penny to seek reinstatement of the unlawfully suspended building permit." App. 13.

Second, the district court ruled that "[t]he jury's award of future profits . . . was based on expert testimony that should not have been received -- or, at least, should not have been received without allowing the District of Columbia to adduce proof that plaintiff's soil remediation facility would never have been permitted to operate." App. 13. The court criticized Tri County's "pro-forma statement of income and expense" (App. 13), which it had ruled pretrial was "insufficient to establish loss of profits with reasonable certainty." DE 67 at 4. Furthermore, Tri County had "no experience in the business of 'burning' soil for remediation" and Tri County's expert had failed to analyze the significance of "the recent failure of a similar remediation facility" in the area and of "the diminish-

ing market price per ton for cleaning petroleum contaminated soil." App. 13.[3]

Third, the court ruled that "the jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience, particularly in view of the realistic prospect, which I did not permit defendants to prove at trial, that there would be continued community resistance" to the project and "a very real likelihood that the District of Columbia would have closed down the remediation facility sooner or later in any event, or that it never would have been permitted to commence operations at all." App. 13-14.

Accordingly, a new trial was necessary unless Tri County accepted "a remittitur of the jury's verdict to $1 million." App. 14. Tri County declined.

**E. The Second Trial.**

At the second trial, the court admitted the District's evidence (1) supporting its *Carey v. Piphus*/mitigation-of-damages arguments and (2) rebutting Tri County's claims that only Mr. Cross's suspension stood in the way of it securing a certificate of occupancy. This evidence included the District's written invitation to Tri County to be heard and its failure to respond. This evidence also included health and safety

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[3]Tri County's *pro forma* statement projected whopping profits. For example, in its first year of operation, it projected revenues of $3,367,500 and expenses of $1,335,908, resulting in a profit of $2,031,592, a profit even its expert admitted was "extraordinary." A143-47, A171 & A209. The court found this evidence speculative, in light of, *inter alia*, unexplained information in the expert's report "about how the competition is driving down the price per ton until it just covers operating costs. . . . And that that has driven one of the competitors out of business . . .." SA483.



information about the project and about regulatory hurdles Tri County would have faced irrespective of the procedurally flawed suspension.

With a more complete record before it, the jury returned a verdict of $100.

**F. The D.C. Circuit's Decision.**

Tri County appealed the order granting the new trial. Citing *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988), it argued that, on appeal, under the abuse of discretion standard, "[t]he trial court's decision to grant a new trial will be given close scrutiny in order to protect the litigants' right to a jury trial." Brief for Plaintiff-Appellant at 30.

The District countered that, under an abuse of discretion standard, "'[a] trial court has wide discretion in setting aside a jury verdict where . . . the motion granted is for a new trial, not judgment n.o.v.; the court's decision concerns matters of fact, not law; and the new trial is ordered because' the first trial 'created a potential for injustice.'" Brief for Appellees at 24-25, quoting *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 849 (D.C. Cir. 1981) (footnote omitted), *cert. denied*, 455 U.S. 904 (1982). The District also countered that "'it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" Brief for Appellees at 24, quoting *Eastern Air Lines, Inc. v. Union Trust Co.*, 239 F.2d 25, 29 (D.C. Cir.), *cert. denied*, 353 U.S. 942 (1956).

The D.C. Circuit rejected the District's position. Instead, the court applied (App. 5 & 10) its recently developed "more searching inquiry" standard. *See, e.g., Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997); *Hutchinson v. Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992). This standard arises from the court's "'concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding mission.'" App. 5, quoting *Langevine*, 106 F.3d at 1023. Accordingly, "close scrutiny is required in order to protect the litigants' [Seventh Amendment] right to jury trial." *Hutchinson*, 952 F.2d at 1421.

Using its "more searching inquiry" standard, the D.C. Circuit ruled that the district court had abused its discretion in granting a new trial. Thus, despite acknowledging the legal requirement that an injured party take "all the reasonable steps" to mitigate its damages, Tri County, even when seeking $11,000,000, and recovering $4,500,000, in lost future profits, need not take *any steps* at all. App. 7. In its view, the district court's failure-to-mitigate ruling was an impermissible *per se* ruling. App. 7.

The court also "question[ed]" the ruling that the award was grossly excessive and shocking. App. 9. In its view, the award was in the reasonable range because it was less than half of the amount Tri County had claimed. App. 9.

Finally, the D.C. Circuit stated:

> . . . [T]he trial court tried to cover all bases in its order granting a new trial but the order reveals that the court's real concern was its exclusion of evidence regarding health and safety issues which may have led to community resistance and, perhaps, regulatory barriers to Tri County's project.



App. 9. In assessing the evidentiary rulings, the D.C. Circuit should have asked whether the district court acted permissibly in ultimately concluding that it should have admitted this evidence. Instead, in a misguided effort to preserve the jury's verdict, the D.C. Circuit asked whether the district court could permissibly have excluded the District's health and safety evidence. The D.C. Circuit ruled that "the district court did not abuse its discretion in excluding the evidence." App. 10. Again invoking its "'more searching inquiry'" standard, the court ruled: "In light of our findings that Tri County's evidence was properly before the jury and the District's evidence was properly excluded, we conclude that the district court, in granting a new trial based on a revised view of its original rulings, did abuse its discretion." App. 10.[4]

### G. Rehearing Denied.

The District filed a petition for rehearing and a suggestion for rehearing *en banc*. It argued that the D.C. Circuit had extant two conflicting standards for reviewing district court orders granting new jury trials and that *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), unequivocally had ruled that the District's proffered standard was correct. In addition, and related to that point, the District urged that the court had erred in reviewing the district court's trial decisions excluding and striking evidence, rather than its ultimate, post-trial decision that this evidence should have been admitted and

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[4]For reasons we do not understand, the D.C. Circuit mistakenly seemed to believe (see App. 3) that the first jury was permitted to consider the District's written invitation to Tri County to be heard and Tri County's refusal to respond. This oversight is important, given that this case is a procedural due process case in which the District contended that Tri County had failed to mitigate its damages from the procedurally flawed suspension.

thus that a new trial was required for that reason, as well as for the others set forth in its new trial order.

The D.C. Circuit denied rehearing.

## REASONS FOR GRANTING THE WRIT

The D.C. Circuit has impermissibly overturned the considered judgment of the district court ordering a new trial and reinstated a $5,000,000 jury verdict against the District of Columbia. For the reasons that follow, this Court should either summarily vacate and remand for reconsideration in light of *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), or order plenary consideration of the D.C. Circuit's decision.

The D.C. Circuit applied the wrong legal standard in reversing the decision to order a new trial. *Gasperini* holds that the Seventh Amendment affords district court judges broad discretion in overseeing jury trials and that appellate courts are correspondingly strictly constrained by an abuse of discretion standard in reviewing new trial decisions. By contrast, the D.C. Circuit maintains that the Seventh Amendment strictly limits the discretion of district court judges to order new trials and that, as a consequence, appellate courts must apply a "'more searching inquiry'" standard in reviewing orders granting new trials. App. 5, quoting *Langevine*, 106 F.3d at 1023; see also App. 10. The D.C. Circuit's standard is flatly inconsistent with *Gasperini*.

As an adjunct to its "more searching inquiry" standard, and to further protect its understanding of the Seventh Amendment, the D.C. Circuit has ruled that it will review on appeal, under an abuse of discretion standard, evidentiary rulings at trial even when the district court judge, in the context of the



entire case, abandoned those rulings in a post-trial order granting a new trial. Accordingly, the ultimate judgment of the district court judge may be ignored even if that judgment is not an abuse of discretion. This approach wrongfully permits an appellate court to substitute its judgment for that of the trial judge.

The D.C. Circuit's standard also conflicts with the decisions of other Circuits. For example, the Seventh Circuit, following *Gasperini*, has held that the usual abuse of discretion standard applies to appellate review of orders granting new trials and that an appellate court must give due regard to the unique position of the trial court in assessing whether a new trial is warranted. See *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 n.3 (7th Cir. 1997). Although one would expect that other Circuits would interpret *Gasperini* as the Seventh Circuit has done, and thus resolve a pre-existing intolerable conflict over the standard of review that applies to appellate review of new trial orders, the D.C. Circuit's disregard of *Gasperini* renders this expectation uncertain. Accordingly, this Court should now make clear that *Gasperini* resolves the pre-existing conflict.

Review is thus necessary to conform the D.C. Circuit's standard for reviewing orders granting new trials to *Gasperini*; to resolve a conflict among the Circuits on the fundamental issue of the scope of a trial court's discretion to order new trials; and to ensure that district court judges in the Nation's Capital exercise the discretion the law gives them to grant new trials.

## I. THE D.C. CIRCUIT'S STANDARD FOR REVIEWING ORDERS GRANTING NEW TRIALS CONFLICTS WITH THIS COURT'S DECISION IN *GASPERINI*.

### A. *GASPERINI*.

The D.C. Circuit's "more searching inquiry" standard and its strict constraints on the discretion of district courts to grant new trials conflict with this Court's decision in *Gasperini*. *Gasperini* stands for two fundamental principles. First, it holds "that the re-examination clause of the [seventh] amendment does not inhibit the power of the trial judge to grant new trials or to order remittitur." *Central Office Tel., Inc. v. American Tel. and Tel. Co.*, 108 F.3d 981, 993 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998). Second, appellate courts, in reviewing grants of new trials, must exercise "'restraint'" and "'*give the benefit of every doubt to the judgment of the trial judge.*'" *Gasperini*, 518 U.S. at 438-39, quoting *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961) (emphasis added). Or, as this Court put it twenty years ago, "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

*Gasperini* was a diversity case in which the Court ruled that federal courts could apply a state statute providing for close judicial scrutiny of jury damages awards without offending the Seventh Amendment.[5] In so ruling, the Court relied on history and longstanding precedent. It acknowledged that

[5]Under the state law in question, courts were "empowered to review the size of jury verdicts and to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'" *Gasperini*, 518 U.S. at 418.



"'[t]he power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government.'" 518 U.S. at 433, quoting 6A Moore's Federal Practice ¶59.05[2], pp. 59-44 to 59-46 (2d ed. 1996).[6] Furthermore, quoting Justice Story, the Court reaffirmed that, "'[i]f it should clearly appear that the jury have committed a gross error . . . or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'" *Id.* at 433, quoting *Blunt v. Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (C.C. Mass. 1822). In short, "'the trial judge in the federal system . . . has . . . *discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence*,'" and this "*discretion includes overturning verdicts for excessiveness* and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Id.* at 433, quoting *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 540 (1958) (brackets supplied by the Court) (emphasis added).

In *Gasperini*, the Court also addressed the respective roles of federal trial judges and appellate courts in administering the substantive law governing damages. Even in a diversity case, these are distinctly federal questions: "'The proper role of the

[6]Or, as the Eleventh Circuit has put it, a district court's authority to order a new trial "is located in the common-law principle, later codified in the Judiciary Act of 1789, that "'[t]rials by jury in civil causes could not subsist now without a power, somewhere, to grant a new trial . . .. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial.'" *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1328 (11th Cir.), quoting *Bright v. Eynon*, 1 Burr. 390, 393 (K.B. 1757) (Lord Mansfield), *cert. denied sub nom., Combustion Eng'g, Inc. v. McGill*, 120 S. Ct. 329 (1999).

trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law.'" *Id.* at 437, quoting *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (*per curiam*).[7]

According to the Court, "primary responsibility" for application of damages law is "lodge[d] in the district court, not the court of appeals . . .." *Id.* at 438. The Court explained: "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' . . . while appellate judges see only the 'cold paper record.'" *Id.* at 438, quoting respectively *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969), and *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 431 (2d Cir. 1995). As a consequence, if an appellate court reverses, "'it must be because of an abuse of discretion . . . . The very nature of the problem counsels restraint . . ..'" *Id.* at 438, quoting *Dagnello*, 289 F.2d at 806. Such restraint requires a federal appellate court to "'*give the benefit of every doubt to the judgment of the trial judge.*'" *Id.* at 438-39, quoting *Dagnello*, 289 F.2d at 806 (emphasis added).

### B. The D.C. Circuit's Conflicting Approach.

The D.C. Circuit's "more searching inquiry" standard for appellate review of district court decisions granting new trials plainly conflicts with *Gasperini*. The D.C. Circuit gave no deference to Judge Robertson's "'unique opportunity to consider the evidence in the living courtroom context'" and he was not "give[n] the benefit of every doubt" in his decision to grant a new trial. *Gasperini*, 518 U.S. at 438, quoting *Taylor*

[7]The state law at issue in *Gasperini* provided that both the state trial and intermediate appellate courts should apply the "materially deviates" standard. 518 U.S. at 437-38.



*v. Washington Terminal Co.*, 409 F.2d at 148, and *Dagnello*, 289 F.2d at 806. Instead, based on its misunderstanding of the Seventh Amendment, the D.C. Circuit brushed aside the panoply of interrelated reasons the trial judge gave for granting a new trial.[8]

First, the D.C. Circuit ruled that the district court had somehow applied a *per se* rule on the issue whether Tri County had taken reasonable steps to mitigate the damages arising from Mr. Cross's suspension of its permit without a hearing. However, as the trial court was well aware, Tri County not only failed to seek administrative review of Mr. Cross's suspension, but even failed to respond to his post-suspension invitation to be heard. The trial court had struck this evidence from the jury's consideration.

Second, because the jury had awarded only about half what Tri County had requested, the D.C. Circuit "question[ed]" the district court's considered judgment that the damages award was excessive. The "rule of thumb" applied by the D.C. Circuit seriously intruded into the district court's analysis of the excessiveness of the award in this case based on the evidence it had heard.

Third, unlike the district court, the D.C. Circuit appeared not to appreciate the narrow scope of the constitutional violation here -- the oral suspension of Tri County's building permit without a hearing. *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d at 460-62. Indeed, two days later, a valid stop work order was entered against Tri County

[8]The District's rehearing petition pointed out that the *Gasperini*-consistent decisions it had cited in its brief as setting the standard of review had their origin in *Taylor*, a D.C. Circuit decision cited favorably in *Gasperini*.

for a regulatory violation. *Id.* at 457 & 462 (observing that "all [parties] agree" that "the stop work order . . . was a legally sufficient bar to Tri County's continuing work on the facility" and remanding for consideration of "the possible mooting effect of the stop work order"). In addition, several weeks later, a District adjudicatory body found Tri County guilty of a pre-suspension regulatory violation, which resulted in an independent suspension of its building permit as a matter of law.[9]

Furthermore, in what we believe is an unprecedented step, the D.C. Circuit, as part of its effort to preserve the jury's verdict at the first trial, elected to review not the district court's ultimate evidentiary rulings but its abandoned trial rulings. On the latter point, the D.C. Circuit ruled that "the district court did not abuse its discretion in excluding the evidence" of health and safety concerns that might have triggered additional regulatory responses or have otherwise allowed the District to rescind its approval of Tri County's building permit. App. 10. This ruling, however, misses the mark. The issue was not whether the district court's abandoned trial rulings excluding and striking evidence were within its discretion but whether, in the living courtroom context, it abused its discretion in its post-trial ruling granting a new trial because, in its view, the damages award was

[9]To be sure, the district court did not spell out in detail its reasoning. However, "[a] trial judge is not required to enter supporting findings of fact and conclusions of law when granting a new-trial motion." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 36 n.3. Furthermore, it should not be assumed that the district court, in its new trial order, "intended to set forth each and every reason for its order." *Id.* at 36 n.3.



excessive and its evidentiary rulings had unfairly prejudiced the District.[10]

In short, the D.C. Circuit's "more searching inquiry" standard is improper when the trial judge grants a new trial "'on the ground that the verdict is against the weight of the evidence.'" App. 10, quoting *Langevine*, 106 F.3d at 1023. That standard becomes even more improper when it causes an appellate court to review evidentiary rulings abandoned by the trial judge instead of the evidentiary rulings he finally concluded were proper. In the case of such evidentiary rulings, the trial judge's role vis-a-vis the jury is exclusive, and when a trial judge grants a new trial based, in whole or in part, on a reassessment of his own evidentiary rulings, he has concluded that he has disabled the jury from performing its function.

Here, the D.C. Circuit wrongly substituted its judgment for the considered discretionary judgment of the district court ordering a new trial. The district court acted well within its discretion in ruling that a new trial was necessary because, *inter alia*, (1) his evidentiary rulings disabled the jury from properly performing its function; (2) an injured party who seeks more than $11,000,000 in damages, based upon a procedural due process violation, cannot be said to have taken reasonable steps to mitigate damages when it takes no available steps whatsoever; and (3) Tri County's profit projections

[10]On this point, the D.C. Circuit criticized the District on the grounds that it "never met the trial court's repeated injunction to show how their health and safety issue would have triggered additional regulatory procedures or otherwise allowed the District to rescind its earlier approval." App. 10. With all due respect, this is a matter that should have been left to the district court to resolve in light of the entire case.

were speculative, especially given the evidence of real market conditions.[11]

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[11]Finally, there can be no question that the D.C. Circuit's erroneous standard of review made a difference here and that the D.C. Circuit is committed to that standard. At oral argument, in a colloquy with counsel for the District, the D.C. Circuit underscored the importance of its close appellate scrutiny standard derived from its decision in *McNeal v. Hi-Lo* (see *supra* at 11):

> THE COURT: What is your best ground for supporting Judge Robertson's decision?
>
> THE COURT: Given the fact that there is a very tough standard in this Circuit –
>
> THE COURT: Yes, I'm thinking of High-Low.
>
> THE COURT: – of taking the case from the jury.
>
> THE COURT: Right.
>
> MS. MURASKY: . . . [T]his Court has to find that Judge Robertson abused his discretion, which is also a high standard.
>
> THE COURT: No, now wait, no, no, no.
>
> THE COURT: No.
>
> THE COURT: No. That's not what High-Low says, does it?
>
> MS. MURASKY: I thought it did.
>
> THE COURT: High-Low, which both Judge Edwards and I sat on, Judge Edwards wrote the opinion, sets forth a rather restrictive standard for a District Judge taking away from a jury a verdict and ordering a new trial. You are familiar with the case, aren't you?
>
> MS. MURASKY: Yes, I am.

Transcript of Argument 16 (Nov. 12, 1999).

In fact, *Hi-Lo* does state that "[t]he decision whether to grant a motion for a new trial . . . should be reversed on appeal only if" the district court's "discretion has been abused." 836 F.2d at 646 (internal quotation marks omitted). However, as is obvious, the D.C. Circuit has eviscerated this standard by interpretation.



## II. Unless *Gasperini* Is Applied To Resolve It, There Is An Intolerable Conflict Among The Circuits Over The Standard To Be Applied To Appellate Review Of New Trial Orders.

There is an intolerable conflict among the Circuits over the standard of appellate review of new trial orders. This conflict continues despite *Gasperini*, whose significance has eluded several Circuits, including the D.C. Circuit. On one side are the Circuits which understand that the Seventh Amendment affords district courts substantial discretion to order new trials; on the other are the Circuits which hold that the Seventh Amendment strictly constrains the district court's discretion in this respect and requires close appellate scrutiny of new trial orders.

The significance of *Gasperini* in granting broad discretion to district courts to order new trials and in constraining appellate court review of such orders has been recognized by the Seventh Circuit, which previously had followed a standard similar to the D.C. Circuit's current approach. In *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), the Seventh Circuit applied *Gasperini's* abuse of discretion standard to review a district court's grant of a new trial. In so ruling, the court observed that, prior to *Gasperini*, it had "applied this standard 'somewhat more exacting[ly]' when the district court granted a new trial because of Seventh Amendment considerations." *Id.* at 1397. Given *Gasperini*, however, the court, pursuant to its Circuit Rule 40(e), overruled its prior jurisprudence; abandoned its exacting scrutiny standard for appellate review; and announced that it would review grants of new trials "with somewhat more deference to the district court, utilizing an ordinary abuse of discretion standard . . .." *Id.* at 1397. The Seventh Circuit subsequently explained that "[g]enerally, an abuse of discre-

tion only occurs where no reasonable person could take the view adopted by the trial court." *McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998) (upholding order granting a new trial on damages) (internal quotation marks omitted).

The conflict among the Circuits over the standard to be applied to appellate review of orders granting new trials runs even deeper. On one side are the Circuits applying a strict scrutiny standard in reviewing new trial orders granted because, in the view of the trial judge, the verdict is against the weight of the evidence. *See, e.g., Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3rd Cir.) (*en banc*) (appellate courts must carefully scrutinize orders granting new trials to ensure that trial judge does not usurp function of jury), *cert. denied*, 364 U.S. 835 (1960); *Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350, 363 (3rd Cir. 1998) (ruling, without citing *Gasperini*, that "a closer degree of scrutiny" applies to new trial orders); *Brady v. Fort Bend County*, 145 F.3d 691, 713 (5th Cir. 1998) (ruling, without citing *Gasperini*, that standard of appellate review governing denial of motion for new trial is more deferential than standard governing grant of new trial), *cert. denied*, 525 U.S. 1105 (1999); *Holmes v. Massillon, Ohio*, 78 F.3d 1041, 1047 (6th Cir.) (ruling post-*Gasperini*, and citing *Lind* and *Hutchinson v. Stuckey*, that appellate court "must closely scrutinize the trial court's justifications in order to protect the litigant's right to a jury trial"), *cert. denied sub nom., Fabianich v. Holmes*, 519 U.S. 935 (1996); and *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972) (following *Lind*), *cert. denied*, 410 U.S. 930 (1973).[12]

[12]The *Fireman's Fund* decision provoked a spirited dissent from an order denying *en banc* reconsideration. 466 F.2d at 188-90 (dissenting (continued...)



On the other side are a number of other Circuits, including, as already noted, the Seventh Circuit. *See, e.g., Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2, 5 (2d Cir. 1996) (ruling, on remand from this Court for reconsideration in light of *Gasperini*, that trial court decision on new trial motion is subject to review under an abuse of discretion standard); *Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 196 n.1 (4th Cir. 1987) (rejecting "invitation to adopt Third Circuit law" as set forth in *Lind* and, citing 11 Wright & Miller, *Federal Practice and Procedure*, §§ 2805 and 2819 (1973), ruling that "[t]he exercise of this power [to grant a new trial] is not in derogation of the right to trial by jury but is one of the historic safeguards of that right"); *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d at 993 (9th Cir.) (describing *Gasperini* as holding "that the re-examination clause of the [Seventh Amendment] . . . does not inhibit the power of the trial judge to grant new trials or to order remittitur); and *Johansen v. Combustion Engineering, Inc.*, 170 F.3d at 1328-29 & 1334-35 (11th Cir.) (citing *Gasperini* and underscoring that appellate courts must defer to trial court orders granting remittitur or new jury trial, given trial judge's unique opportunity to consider the evidence, including the credibility of witnesses).

In short, there is a sharp conflict among the Circuits over an issue which is very fundamental to our civil justice system -- the leeway a trial judge has to grant new trials on the grounds that a jury verdict is contrary to the weight of the

[12](...continued)
from denial of rehearing *en banc* because, contrary to venerable Supreme Court precedent and law of the Circuit, panel did not apply rule that "a 'motion for new trial is addressed to the judicial discretion of the trial judge and will not be reversed except for a *clear abuse* of that discretion'") (*id.* at 188 (emphasis supplied by dissent)).

evidence and the standard of appellate review applicable to a new trial order. This Court should make clear that *Gasperini* resolves this conflict.

## CONCLUSION

Tri County was not deprived of its Seventh Amendment right to a jury trial by the district court's order granting a new trial. Instead, it received a jury trial in a proceeding that was fair to both sides, and the jury awarded it $100.

The Court should grant this petition for review and summarily vacate and remand this case to the D.C. Circuit for reconsideration in light of *Gasperini*. In the alternative, it should grant plenary review.

Respectfully submitted,

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# APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued November 12, 1999 Decided January 18, 2000

No. 99-7028

TRI COUNTY INDUSTRIES, INC.,
APPELLANT

v.

DISTRICT OF COLUMBIA, *ET AL.*,
APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 94cv02014)

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*Frank J. Emig* argued the cause for the appellant.

*Donna M. Murasky*, Assistant Corporation Counsel, Office of the Corporation Counsel, argued the cause for the appellees. *Robert R. Rigsby*, Interim Corporation Counsel, and

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Charles L. Reischel*, Deputy Corporation Counsel, Office of the Corporation Counsel, were on brief for the appellees.

Before: EDWARDS, *Chief Judge*, SILBERMAN and HENDERSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: This appeal arises from proceedings determining what damages, if any, appellant Tri County Industries, Inc. (Tri County) should be awarded to compensate for what this court previously determined to be the District of Columbia's (District) violation of its fifth amendment right to procedural due process. *See Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 460–62 (D.C. Cir. 1997). Following the first of two trials, the jury awarded $5,000,000. The trial court then granted a new trial, *nisi* remittitur to $1,000,000, which was refused. At the second trial, the district court admitted evidence excluded from the first and the jury returned nominal damages of $100. Tri County challenges the court's order granting the District's alternative motion for a new trial as well as several evidentiary rulings in the second trial and requests reinstatement of the first award or, in the alternative, a new trial due to allegedly erroneous evidentiary rulings during the second trial. For the reasons set forth below, we reverse the district court's order of July 23, 1998 and reinstate the original jury verdict of $5,000,000.

## I.

On February 26, 1993 Tri County obtained a building permit from the District authorizing conversion of an empty warehouse into a facility for its business of decontaminating soil tainted with oil and other hazardous materials. While securing the permit, Tri County also obtained an air quality permit as well as a waiver of the required environmental impact statement. Even several months after it obtained the necessary permits, however, it had not begun operating due to equipment delivery delays. On September 7 it received a District citation for storing soil at the facility without the



required certificate of occupancy.[1] Tri County neither removed the soil nor paid the fine; consequently, the District issued a stop-work order on September 22. Tri County did not challenge the citation or order. Its failure to respond led to an order by the District Department of Consumer and Regulatory Affairs (DCRA) dated October 13, 1993 purporting to suspend Tri County's building permit.

The building permit had already been suspended on September 20, however, when, prompted by a groundswell of community opposition to the project, Hampton Cross, acting DCRA director, summarily suspended Tri County's building permit. The DCRA sent Tri County a letter requesting further information on October 15, 1993 to which Tri County did not respond. On December 6 the DCRA sent another letter, this time rescinding the environmental impact statement waiver and threatening imminent revocation proceedings on the building permit. Tri County's only response was to remove the soil that had caused the initial citation. Tri County's counsel advised it that an appeal likely would be influenced by politics given the strong community opposition and that he could not guarantee when such an appeal would be heard. Given the high rental cost of the property in question and the necessity of purchasing, without delay, costly equipment in high demand, Tri County estimated the costs of an appeal at nearly $1,000,000. With no assurance of a prompt hearing and the prospect of a politically influenced review process, Tri County abandoned its project.

Tri County brought suit under 42 U.S.C. § 1983 and succeeded in its challenge to the September 20 suspension of its building permit when this court reversed the district court's dismissal, holding that the suspension violated Tri County's right to procedural due process. *See Tri County Indus.*, 104 F.3d at 460–62. We remanded for consideration of damages.

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[1] A certificate of occupancy is issued when renovation of a structure has been completed in conformity with the earlier application for a building permit and the building is found to be in compliance with applicable zoning regulations and the building code. *See* 12 DCMR § 118, 39 DCR 8711–12.

*See id.* at 462. The subsequent proceedings in the district court are at issue in this appeal.

The first trial began on April 14, 1998. Tri County presented evidence of its costs already incurred, evidence of lost profits through the testimony of a mechanical engineer and the report of an economist and evidence as to the local market demand for a soil treatment facility through the testimony of a geologist at an environmental consulting firm. The District largely accepted the testimony, often failing to object or seriously cross-examine. Instead, the District relied on its argument that Tri County failed to mitigate its damages when it refused to provide the information the DCRA requested and when it declined to challenge the stop-work and suspension orders. The District also sought to demonstrate that Tri County might not have been allowed to operate its facility because community opposition, arising largely out of concern over the facility's effect on the health and safety of the community, would derail the regulatory procedures. Hindering its argument was the trial court's exclusion or striking of evidence relating to health and safety concerns. *See* Joint Appendix (JA) 186–89. The court found the District's permitting process had resolved the issues as a matter of law. *See id.* at 182–83, 189. In the end, the jury awarded $5,000,000.

The trial court denied the District's post-trial motion for judgment as a matter of law but granted the alternative motion for a new trial, *nisi* remittitur to $1,000,000. Addressing the District's primary argument, the court ruled that the District had to establish both the standard for reasonable mitigation under the circumstances and that Tri County failed to meet it. The District failed to sustain that burden, particularly in light of Tri County's evidence that it would have to spend nearly $1,000,000 to recoup its expenses of $536,421. The court reversed field, however, in reviewing the award for future damages which, assuming the $536,421 in costs were awarded, constituted $4,463,579 of the $11,628,174 figure Tri County presented to the jury. Emphasizing that Tri County did not "invest[ ] a penny to seek reinstatement of the unlawfully suspended building permit," the court ruled that



the District need not have established a reasonableness standard because Tri County's failure to mitigate was unreasonable *per se*. District Court's Memorandum Order filed July 23, 1998 (Memorandum Order), at 2. The court also found the lost profits evidence should not have been considered by the jury without the District having the chance to prove that the facility might not have been allowed to operate. Accordingly, the court found the estimate of lost profits "too speculative and remote" and, in any event, found the award "grossly excessive." *Id.*

Tri County declined the $1,000,000 remittitur and a second trial commenced on January 29, 1999. In this trial, the district court allowed the District to admit the health and safety evidence originally excluded. This time the District challenged Tri County's experts and offered the testimony of three new witnesses, one of whom refuted Tri County's estimate of future profits. Another witness discussed a potential zoning bar to the facility and the third discussed health and safety hazards associated with soil remediation. The second jury awarded Tri County nominal damages of $100.

## II.

We review the district court's grant of a new trial for abuse of discretion. *See Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) (citing *Hutchinson v. Stuckey*, 952 F.2d 1418, 1420–21 (D.C. Cir. 1992)). "[A] more searching inquiry is required" if the new trial is granted than if denied, however, because of "the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function." *Id.* at 1023 (quoting *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978)).

In its post trial order, the trial court stated three reasons for granting a new trial: (1) Tri County's failure to mitigate; (2) the speculativeness in Tri County's projections of future profits; and (3) the "grossly excessive" jury verdict. Memorandum Order at 2. The court also thought it had erred in its evidentiary rulings excluding evidence related to community

opposition to the project. *See* Memorandum Order at 2 (plaintiff's expert testimony should not have been received "without allowing [the District] to adduce proof that plaintiff's soil remediation facility would never have been permitted to operate"). Tri County challenges each ground.

First, the court found Tri County's failure to expend any resources to seek reinstatement of its building permit *per se* unreasonable in light of the $11,628,174 it claimed in lost profits. *See id.* Tri County contends that the determination of whether a party satisfied its duty to mitigate, a question that turns on what action was reasonable under the circumstances, *see, e.g.*, *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111 (D.C. Cir. 1999); *Lennon v. United States Theatre Corp.*, 920 F.2d 996 (D.C. Cir. 1990), is a jury question. Here, we agree with Tri County that its alleged failure to mitigate was an issue properly submitted to the jury. *See Hilord Chem. Corp. v. Ricoh Elecs., Inc.*, 875 F.2d 32, 38–39 (2d Cir. 1989); *Waldorf v. Shuta*, 142 F.3d 601, 623–24 (3d Cir. 1998). Moreover, failure to mitigate is an affirmative defense and the party asserting it bears the burden of demonstrating the opposing party's failure to act reasonably under the circumstances. *See Lennon*, 920 F.2d at 1000; *see also Mark Keshishian & Sons, Inc. v. Washington Square, Inc.*, 414 A.2d 834, 842 n.19 (D.C. 1980) (burden of showing mitigation is on party raising issue) (citing *Camalier & Buckley–Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407, 419–20 n.92 (D.C. Cir. 1975)).

Tri County created a jury issue when it offered an explanation for its failure to challenge the DCRA's suspension order or otherwise pursue administrative remedies. Its explanation included evidence that it believed suggested the reviewing body, the District's Board of Appeals and Review, might not have acted impartially due to political influence and that an appeal would have been indefinitely slow and expensive.[2]

[2] Tri County's lawyer (in 1993) testified that Cross told him that the Board of Appeals and Review would act at the direction of the District's Mayor and the Mayor's chief of staff. Tri County introduced Cross's deposition testimony indicating he had met with the Mayor and members of the community opposition following the suspension of the permit. Tri County's lawyer also testified that it would have taken eight to twelve months to resolve the matter administratively. JA 76–77.



Moreover, a jury justifiably could have found it reasonable for Tri County not to contest the September 22 stop-work order and subsequent suspension resulting from the failure to pay the fine given the pre-existing September 20 suspension. The District argues simply that the evidence it presented regarding Tri County's failure to mitigate "was firmer by far." Brief of Appellee at 30. Tri County responds that it is improper to now assess the relative strength of the parties' showings. Indeed, the trial court properly gave the failure to mitigate issue to the jury and properly instructed the jury on that issue:

> [T]he law requires that an injured party take all the reasonable steps it can to avoid further injury and reduce its loss. Tri County may not recover damages for any portion of its injury which it could have avoided through the exercise of reasonable care and prudence.... The District asserts that Tri County by failing to pay the $500 fine ... and by failing to appeal the stop work order, is not entitled to any damages.

JA 193. Thus, to the extent the district court based its new trial decision on the mitigation issue, it abused its discretion in declaring *ex post* that Tri County's failure to pursue administrative remedies to reinstate its permit was *per se* unreasonable, thereby withdrawing the mitigation issue from the jury. *See generally Tatum v. Morton*, 562 F.2d 1279, 1283 (D.C. Cir. 1977) ("[T]he district court's *per se* approach of imposing an absolute duty to mitigate was not sound.").

The trial court also found that Tri County's evidence of lost profits was "too speculative and remote" and that the award of less than half of the amount Tri County estimated was "grossly excessive." Memorandum Order at 2. Where, as here, the fact of injury has been established and the defendant's action (suspension of the building permit) affected the plaintiff's ability to present actual revenue and cost figures to

support a lost profits projection, the applicable standard for proving lost profits damages is the one this court enunciated in *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227 (D.C. Cir. 1997):

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person.... In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Thus, while a plaintiff seeking to recover lost profits must ordinarily prove the fact of injury with reasonable certainty, proof of the amount of damages may be based on a reasonable estimate. Although a court will not permit a plaintiff to recover damages based on "mere speculation or guess," the fact that an estimate is uncertain or inexact will not defeat recovery....

114 F.3d at 1234–35 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)) (citations omitted).

Tri County produced evidence indicating it sustained lost profits of $11,628,174. The evidence included the testimony of eight witnesses[3] and ranged from projections of tons of contaminated soil the facility would treat per hour and the number of hours it would operate per day to estimates of equipment and labor costs. With expert testimony regarding the accessible market for soil remediation and a comparison of service rates for similar operations, an economist projected the profitability of Tri County's facility. Their respective opinions were left largely unchallenged by the District. Regardless whether the estimates were on the high end, that is,

[3] The witnesses included its President, Glenn Selzer, its Vice President and its CPA. In addition, a chemical engineer, a remediation expert, a financial economist, a mechanical engineer and an expert in soil remediation testified as to Tri County's costs and lost profits.



"uncertain or inexact," *Samaritan Inns*, 114 F.3d at 1235, they were sufficiently well-founded to avoid characterization as "mere speculation or guess." *Id.*

Moreover, we question the trial court's finding that the award "shock[ed] the judicial conscience." Memorandum Order at 2. Tri County presented evidence that its costs amounted to $536,421 and its lost profits amounted to $11,628,174. The jury awarded $5,000,000, less than half of the total amount claimed and, for that matter, less than half of the future profits estimate standing alone. The award was within the "reasonable range within which the jury may properly operate." *Langevine*, 106 F.3d at 1024.

As demonstrated above, the trial court tried to cover all bases in its order granting a new trial but the order reveals that the court's real concern was its exclusion of evidence regarding health and safety issues which may have led to community resistance and, perhaps, regulatory barriers to Tri County's project. For example, while declaring the award grossly excessive, the district court expressed its dissatisfaction with its original evidentiary rulings:

> [T]he jury's award ... shocks the judicial conscience, particularly in view of the realistic prospect, which I did not permit defendants to prove at trial, that there would be continued community resistance to increased dump truck traffic ... and a very real likelihood that the District of Columbia would have closed down the remediation facility ... or that it never would have been permitted to commence operations at all.

Memorandum Order at 2–3; *see also id.* at 2 (plaintiff's expert testimony should not have been received "without allowing [the District] to adduce proof that plaintiff's soil remediation facility would never have been permitted to operate").

In the excerpt above, the district court alluded to the District's argument under *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978), that a plaintiff who suffers a procedural due process violation is entitled only to nominal damages if he

would have suffered the same "injury" absent the violation. Thus, the District argues that here the procedural violation caused no compensable injury because the action taken, suspension of the permit, was justified even if improperly executed. The District claimed that Tri County's damages were minimal because the facility either would not have become operational or would not have been operational for long due to community resistance.

The trial court excluded the District's health and safety evidence under Rule 403 and determined that the permitting process disposed of these issues as a matter of law. *See* JA 178, 189. The District argues that the evidentiary rulings practically negated its argument under *Carey* that the project would have been halted anyway. Despite its reliance on this argument, the District never met the trial court's repeated injunction to show how the health and safety issue would have triggered additional regulatory procedures or otherwise allowed the District to rescind its earlier approval. *See* JA 172; *see also id.* at 168–69, 172–75, 186–87. In short, the District failed to show that community concern would be brought to bear on Tri County's operation, specifically through the regulatory process. Accordingly, the district court did not abuse its discretion in excluding the evidence. In light of our findings that Tri County's evidence was properly before the jury and the District's evidence was properly excluded, we conclude that the district court, in granting a new trial based on a revised view of its original rulings, did abuse its discretion.[4] *See Langevine*, 106 F.3d at 1023 (a "more searching inquiry" is particularly necessary "when the motion [for new trial] is granted on the ground that the verdict is against the weight of the evidence").

For the foregoing reasons, we reverse the district court's order of July 23, 1998, reinstate the original jury verdict of $5,000,000 and vacate the verdict and judgment resulting from the second trial.

*So ordered.*

---

[4] In light of our holding, we need not reach Tri County's alternative grounds for reversal based on the second trial.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Tri-County Industries, Inc.,
Plaintiff(s),

v. Civil Action No. 94-2014 (JR)

District of Columbia, et al.
Defendant(s).

**FILED**
**APR 20 1998**
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

## JUDGMENT ON THE VERDICT
FOR PLAINTIFF

**This cause having been tried by the Court and a Jury, before the Honorable James Robertson, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,**

**IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) Tri-County Industries, Inc. have and recover of and from the defendant(s) District of Columbia, et al. the sum of Five Million Dollars ($5,000,000.00), together with costs.**

NANCY MAYER-WHITTINGTON, Clerk

**Dated:** /s/ April 20, 1998 **By:** /s/ Jackie Francis
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRI-COUNTY INDUSTRIES, INC.
Plaintiff,

v. Civil Action No. 94-2014 (JR)

DISTRICT OF COLUMBIA, *et al.*
Defendants.

**FILED**
**JUL 23 1998**
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM ORDER

Before the Court is defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial [#115].

The motion for JNOV (now, of course, properly styled judgment as a matter of law, Fed. R. Civ. P. 50), will be denied. The most important grounds for defendants' motion, set forth as well in several pretrial motions, is that plaintiff failed to mitigate its damages. The mitigation question turns upon what would have been reasonable for Tri-County to do by way of mitigation. Plaintiff adduced proof that it would have had to make capital expenditures, continue in possession of a lease, and incur substantial legal expenses over a long period of time to have a chance of going forward with its business. The jury might reasonably have found that it would have been unreasonable to spend nearly a million dollars to recoup the $536,421 in expenses Tri-County had already incurred. In any case, the party raising mitigation as an affirmative defense must prove that there is a standard for reasonableness and that plaintiff did not meet it. Norris v.



Green, 656 A.2d 282 (D.C. 1995). The District of Columbia did not sustain that burden at trial.

The jury's award of future profits is another matter. Plaintiff's position is that it was entitled to recover $11,628,174 of future profits (the jury apparently awarded $4,463,579) without investing a penny to seek reinstatement of the unlawfully suspended building permit. No proof of a standard of reasonable mitigation efforts is required to evaluate that proposition: it is unreasonable *per se*.

The jury's award of future profits, moreover, was based on expert testimony that should not have been received -- or, at least, should not have been received without allowing the District of Columbia to adduce proof that plaintiff's soil remediation facility would never have been permitted to operate. Plaintiff's proof of future profits consisted of what amounted to a pro-forma statement of income and expense. Plaintiff had no experience in the business of "burning" soil for remediation. Plaintiff's expert testimony acknowledged the recent failure of a similar remediation facility in Virginia, but the impact of that failure upon plaintiff's hoped-for future profits was not analyzed, nor was the implication of the diminishing market price per ton for cleaning petroleum-contaminated soil. Upon reflection, I am convinced that the evidence of lost future profits was too speculative and remote and that it failed to meet the required standard of reasonable certainty.

In addition, the jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience, particularly in view of the realistic prospect, which I did not permit defendants to prove at trial, that there would be continued community resistance to increased dump truck traffic along Bryant Street, where the

remediation facility was located, and a very real likelihood that the District of Columbia would have closed down the remediation facility sooner or later in any event, or that it never would have been permitted to commence operations at all.

Accordingly, it is necessary to grant the motion for a new trial. At the new trial, if plaintiff is again permitted to adduce proof of lost future profits, defendants will be permitted to rebut that proof with evidence of the likely course of future community resistance and regulatory activities with respect to the remediation facility.

Because a new trial on damages may be unduly burdensome upon the parties, however, the order for a new trial will be nisi remittitur. See Faison v. Nationwide Mortgage Corp., 839 F.2d 680, 693-94 (D.C. Cir. 1987); Hutchinson v. Stuckey, 952 F.2d 1418, 1423 n.5 (D.C. Cir. 1992); Langevine v. District of Columbia, 106 F.3d 1018, 1026 n.3 (D.C. Cir. 1997) (Henderson, J., concurring in part and dissenting in part).

The motion for a new trial will be granted unless, within thirty days after entry of this order, plaintiff accepts a remittitur of the jury's verdict to $1 million.

Dated: /s/ July 23, 1998

/s/ James Robertson
JAMES ROBERTSON
United States District Judge



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRI-COUNTY INDUSTRIES, INC.
Plaintiff(s)

v. Civil Action No. 94-2014

DISTRICT OF COLUMBIA, ET AL.
Defendant(s).

**FILED**
**FEB - 4 1999**
NANCY-MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

## JUDGMENT ON THE VERDICT
FOR PLAINTIFF

**This cause having been tried by the Court and a Jury, before the Honorable James Robertson, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,**

**IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) Tri-County Industries, Inc. have and recover of and from the defendant(s) District of Columbia, the Mayor of the District of Columbia, the Department of Consumer and Regulatory Affairs, the Director of the Department of Consumer and Regulatory Affairs and the Administrator of Environmental Regulation Administration the sum of One Hundred Dollars ($100.00) as nominal damages, together with costs.**

NANCY MAYER-WHITTINGTON, Clerk

**Dated: /s/ Feb. 4, 1999** **By: /s/ Joseph G. Burgess**
**Deputy Clerk**

**UNITED STATES COURT OF APPEALS**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 99-7028** **September Term, 1999**
**94cv02014**

Tri-County Industries, Inc.,
a Maryland Corporation,
Appellant

V.

District of Columbia,
a municipal corporation, et al.,
Appellees

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 8 2000

CLERK

**BEFORE**: Edwards, Chief Judge, Silberman and Henderson, Circuit Judges

**ORDER**

Upon consideration of appellees' petition for rehearing filed February 17, 2000, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk



**UNITED STATES COURT OF APPEALS**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 99-7028** **September Term, 1999**
**94cv02014**

Tri-County Industries, Inc.,
a Maryland Corporation,
Appellant

V.

District of Columbia,
a municipal corporation, et al.,
Appellees

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 8 2000

CLERK

**BEFORE**: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

**ORDER**

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel did not participate in this matter.

Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

(2)

No. 99-1953

IN THE

# Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,

*Petitioners,*

*v.*

TRI COUNTY INDUSTRIES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF IN OPPOSITION

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23 P

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Tri County Industries, Inc. ("Tri County") has no parent corporations and no publicly held company owns 10% or more of Tri County's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement Pursuant to Rule 29.6 | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Statement of the Case | 1 |
| I. The Facts. | 1 |
| II. The D.C. Circuit's Decision. | 5 |
| Reasons for Denying the Writ | 7 |
| I. The District Of Columbia Has Waived The Issue Asserted In Its Petition. | 7 |
| II. The D.C. Circuit's Reversal Of A District Court Order Granting A New Trial Does Not Conflict With This Court's Decision In *Gasperini*. | 9 |
| III. No Conflict Exists Among The Circuits That Would Justify The Granting Of The District Of Columbia's Petition For Certiorari. | 13 |
| IV. The D.C. Circuit Was Correct In Concluding That The District Court Abused Its Discretion In Setting Aside The Original Jury Verdict And Granting A New Trial. | 15 |
| Conclusion | 16 |




## TABLE OF CITED AUTHORITIES


| | Page |
|---|---|
| **Cases:** | |
| *Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994) | 8 |
| *Barbour v. Browner*, 181 F.3d 1342 (D.C. Cir. 1999) | 2 |
| *Carey v. Piphus*, 435 U.S. 247 (1978) | 2 |
| *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998) | 14 |
| *Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2 (2d Cir. 1996) | 14 |
| *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) | 9, 12 |
| *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) | 13 |
| *Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2d Cir. 1961) | 9 |
| *Escobar Ruiz v. I.N.S.*, 813 F.2d 283 (9th Cir. 1987) | 8 |
| *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) | 10, 11 |

*Page*

*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996) ..... 7, 9, 11, 12, 13, 14

*General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) ..... 11

*Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987) ..... 14

*Grant v. U.S. Air Force*, 197 F.3d 539 (D.C. Cir. 1999) ..... 8

*Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156, 89 S. Ct. 331, 21 L. Ed. 2d 309 (1968) .... 11, 12

*Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87 (D.C. Cir. 1987) ..... 10

*Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1997) ..... 14

*Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) ..... 10, 12

*Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997) ..... 6, 10, 11, 15

*Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960) (*en banc*), *cert. denied.* 364 U.S. 835 (1960) ..... 14



*Page*

*Matter of Innovative Construction Systems, Inc.*, 793 F.2d 875 (7th Cir. 1986) ..... 13

*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988) ..... 7

*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) ..... 13

*Moore v. United States*, 598 F.2d 439 (5th Cir. 1979) ..... 8

*Pullman-Standard v. Swift*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) ..... 6, 10

*Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) ..... 6, 11, 12

*Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227 (D.C. Cir. 1997) ..... 6, 15

*Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238 (7th Cir. 1992) ..... 13

*Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) ..... 8

*Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969) ..... 9

*Cited Authorities*


| | *Page* |
|---|---|
| *Tennessee v. Dunlap*, 426 U.S. 312, 96 S. Ct. 2099, 48 L. Ed. 2d 660 (1976) | 8 |
| *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997) | 3 |
| *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) | 8 |
| *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999) | 8 |
| *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988) | 11, 12 |
| **Rules:** | |
| Federal Rule of Appellate Procedure 28(a)(9)(B) | 7 |
| Federal Rule of Appellate Procedure 28(b) | 7 |
| Federal Rule of Evidence 403 | 4 |




## STATEMENT OF THE CASE

### I. The Facts.

The District of Columbia begins its Petition by referring to the storage of contaminated soil by Tri County at the soil remediation facility prior to the issuance of a certificate of occupancy and the resulting notice of infraction and stop work order that were issued by government officials. It then indicates that Tri County's building permit was automatically suspended when the company failed to appear on October 13, 1993, at the Office of Adjudication for a hearing on the notice of infraction.

Omitted from this factual summary was any reference to the testimony of the District's own witnesses that both the stop work order and the suspension by the Office of Adjudication could have been removed at any time without difficulty by Tri County. Juan Berrayarza, an inspector for the District of Columbia, testified that the stop work order would have been lifted as soon as Tri County paid the underlying ticket and either removed the soil from the warehouse or obtained a certificate of occupancy. (SSA600-SSA601).[1] Phillip Thomas, a building inspector for the District, testified to the same facts . (SSA602) Lenox Simon, a defense witness from the Office of Adjudication, stated that once the fine was paid, the automatic suspension that resulted from the October 13, 1993 hearing would have been lifted. (SSA605-SSA606)

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1. References to the record below are as follows: "A" (Appendix filed in the D.C. Circuit); "SA" (Supplemental Appendix filed in the D.C. Circuit); "SSA" (Second Supplemental Appendix filed in the D.C. Circuit); and "T" (Trial Transcript).

Glenn Selzer, the president of Tri County, testified, without objection, that Tri County could at any time have removed the contaminated soil or obtained a provisional certificate of occupancy. (A69-A70) He also stated that Tri County had the ability to pay the relatively minor fine that had been imposed. (A69) Selzer testified that the major difficulty was Cross' earlier unconstitutional suspension of September 20, 1993, and that, until this suspension was lifted, the resolution of both the stop work order and the suspension for non-payment of the fine were not significant issues. (A70-A71)

As a result, the effect of the notice of infraction, stop work order and the Office of Adjudication decision became a jury question. The District argued, based upon *Carey v. Piphus*, 435 U.S. 247 (1978), that these administrative actions mooted the effect of Cross' unconstitutional suspension of September 20, 1993. Tri County contended that they were only a minor impediment, correctable at Tri County's discretion whenever Cross' suspension was lifted. The jury, in the first trial, accepted Tri County's position. A "jury's resolution of a factual dispute will stand if it is reasonably supported by the evidence." *Barbour v. Browner*, 181 F.3d 1342, 1344-45 (D.C. Cir. 1999).

The District of Columbia further refers to a letter dated October 15, 1993, from DCRA to Tri County seeking additional information regarding the project. (A394) It neglects to mention that the District reviewed this project for eight months before the building permit was issued on February 26, 1993, and that such review was extensive, including visits to the site. (Sweeney testimony, SSA613-SSA616) Sweeney, who had previously participated in the review of this project for the District, admitted that the



information requested in the October 15, 1993 letter would normally have been considered by DCRA during its review of the building application. (SSA616) Sweeney never asked anyone in DCRA if they already had this information before sending this letter to Tri County. (SSA616) Selzer stated that this information had previously been provided. (A291-A294) There was also no legal basis authorizing the District to request the information sought by this letter after the building permit had been issued. *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 457 (D.C. Cir. 1997) and A181-182. The District Court properly excluded this letter during the first trial. (A188)

The District Court also excluded from evidence a letter from DCRA to Tri County dated December 6, 1993 (A396), which purported to withdraw DCRA's environmental approval of this project. (A306-A310) Tri County had objected to the admission of this letter since the failure to respond to the October 15, 1993 correspondence was identified as one of the reasons for such withdrawal. In addition, the letter prejudicially refers to "significant adverse environmental impacts on nearby homes", which was a conclusion not supported by evidence introduced during the first trial.

The District of Columbia refers to alleged misrepresentations regarding the proximity of the Tri County facility to nearby residences. However, the District admitted in its answer that it had conducted an extensive review of Tri County's application for this facility including visits to the site. (SSA613) Based on such visits, the District acknowledged that it was aware of the location of these residences before it issued the building permit to Tri County. (SSA613) There was no basis for concluding that the District of Columbia was deceived when it issued the building permit to Tri County.

Lastly, the District of Columbia complains that the District Court struck all testimony regarding the health and safety dangers of this project when it concluded that such issues had been considered and resolved during the permitting process. This testimony was potentially very prejudicial to Tri County. There was also the testimony of the District of Columbia employees that, after an admittedly extensive review, this project would not imminently and substantially affect the public health, safety and welfare. (Sweeney, 4/16/98, T.435) The District of Columbia had further determined that there would be no significant environmental impact from this project when it granted approval to proceed without an environmental impact statement. (A390) Sweeney additionally stated that if the contaminated soil was kept inside the building, as was intended by Tri County, it would have no adverse effect on the surrounding homes. (SSA615) This testimony of a proper governmental review of the project warranted the exclusion of health and safety concerns from the trial under Rule 403 of the Federal Rules of Evidence, especially in view of the District of Columbia's failure to identify any legal means of closing the project after the permit had been issued. (A186-A187) The Court did not allow the jury to hear the testimony of Alfred Siess since he merely disagreed with the District of Columbia's decision to issue a permit for a soil remediation facility (A182-185) and his testimony would have only frightened the jury.

In its Memorandum Order granting a new trial, the District Court did not base its decision on the existence of other administrative suspensions, the proximity of residential homes, or the exclusion of all testimony relating to the health and safety of the project, including Siess and the October 15 and December 6, 1993 letters.



The District of Columbia's complaint that the record from the first trial was truncated is attributable solely to: (1) its own failure to call any witnesses on the issue of damages; and (2) its inability to establish a basis for termination of the project despite repeated requests from the District Court for such evidence.

Tri County also incorporates by reference all facts contained in the two opinions of the D.C. Circuit issued in these proceedings.

## II. The D.C. Circuit's Decision.

The District of Columbia incorrectly argues that the D.C. Circuit applied a "more searching inquiry" standard to review the granting of a new trial. The standard of review used by the D.C. Circuit was abuse of discretion. (Pet., App. at 5, 7 and 10) While a more searching inquiry of the record may have been conducted by the D.C. Circuit to protect Tri County's constitutional right to a jury trial, the type of review does not affect the abuse of discretion standard that was employed.

The errors that the D.C. Circuit found in its review of the District Court's decision to grant a new trial were primarily legal in nature. It concluded that the trial court's imposition of an absolute duty on Tri County to mitigate its damages by pursuing an administrative appeal was erroneous. Numerous cases were cited by the D.C. Circuit in support of its conclusion. The failure to mitigate depended on "what action was reasonable under the circumstances," which was a jury question in view of Tri County's explanation for not initiating an administrative appeal. (Pet., App. at 6) The second legal error involved whether Tri County's evidence

of lost profits was speculative. The District Court overlooked and failed to apply the correct standard for proving such damages that was set forth in *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227 (D.C. Cir. 1997), when it granted a new trial. The District Court also ignored the controlling case of *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997), when it stated that the amount of damages awarded by the jury shocked its conscience. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swift*, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789, 72 L. Ed. 2d 66 (1982). These errors cannot be said to involve mixed questions of law and fact since the applicable rule of law was never applied.[2] See *Pullman-Standard*, 456 U.S. at 289 n.19, 102 S. Ct. at 1790 n.19. Lastly, the District Court made a clearly erroneous factual finding when it stated in its Memorandum Order that it prevented the District of Columbia from presenting evidence that the Tri County facility would never have opened. Such actions by the trial court are not evident in the record. (Pet., App. at 10) It was the District of Columbia's failure to produce such evidence that resulted in the jury not considering this issue.

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2. In some circumstances, deferential review may be accorded to mixed questions of law and fact. *See Salve Regina College v. Russell*, 499 U.S. 225, 233, 111 S. Ct. 1217, 1222, 113 L. Ed. 2d 190 (1991).



## REASONS FOR DENYING THE WRIT

### I.

### THE DISTRICT OF COLUMBIA HAS WAIVED THE ISSUE ASSERTED IN ITS PETITION.

FRAP 28(a)(9)(B) requires the appellant to include in its brief that is submitted to the D.C. Circuit "a concise statement of the applicable standard of review" for each issue. If it is dissatisfied with the appellant's statement, the appellee should set forth its own statement of the standard of review. *See* FRAP 28(b).

With respect to the first trial, Tri County argued that the applicable standard of review was abuse of discretion. (Appellant's brief at 30, 31, 36, 44 and 45) Citing *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988), Tri County specifically indicated that the lower court's decision to grant a new trial was to be given "close scrutiny" to protect its right to a jury trial. (Appellant's brief at 30)

The District of Columbia never challenged in its brief whether such close scrutiny was appropriate or permissible. The District of Columbia's brief did not refer to *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). The District of Columbia did not object to this "more searching inquiry" during oral argument. (Pet. at 22)

The District of Columbia first asserted its argument that a more searching inquiry by the appellate court was impermissible in its Petition for Rehearing and, in the

Alternative, for Rehearing *en banc*.[3] In a one sentence *per curiam* order, the D.C. Circuit denied the Petition on March 8, 2000. (Pet., App. at 16-17) The basis for this summary denial of the District's argument was undoubtedly its waiver of this issue since it had not been raised earlier. *See Grant v. U.S. Air Force*, 197 F.3d 539, 542 n.6 (D.C. Cir. 1999) (argument first made in a reply brief comes too late) and *United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984). This position is consistent with other Circuits that have considered the same issue. *See United States v. Charley*, 189 F.3d 1251, 1264 n.16 (10th Cir. 1999) (defendant not allowed to introduce new issues in a petition for rehearing); *Anderson v. Branen*, 27 F.3d 29, 30 (2nd Cir. 1994) (refusal to consider new issue raised in a petition for rehearing); *Escobar Ruiz v. I.N.S.*, 813 F.2d 283, 285-286 (9th Cir. 1987) (extraordinary circumstances required to consider for the first time on rehearing issues not raised in briefs); *Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979) (absent exceptional circumstances, new matters raised for the first time in a petition for rehearing will not be considered).

Issues presented in a petition for certiorari must have been considered by the appellate court or else the petition will be dismissed. *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3, 96 S. Ct. 2099, 2101 n.3, 48 L. Ed. 2d 660 (1976); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973). Since the appropriateness of close scrutiny of the record was not timely raised by the District of

3. In its Petition for a Writ of Certiorari, the District of Columbia incorrectly suggests that it proposed a different standard for review in its brief. (Pet. at 11) The District of Columbia merely stated in its Appellees' brief that it "agrees that the errors assigned by Tri County are subject to review under an abuse-of-discretion standard." (Appellees' brief at 22)



Columbia and not considered by the Court of Appeals, this issue has been waived and the Petition for Writ of Certiorari must be dismissed.

## II.

## THE D.C. CIRCUIT'S REVERSAL OF A DISTRICT COURT ORDER GRANTING A NEW TRIAL DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *GASPERINI.*

The District of Columbia's reliance upon the *Gasperini* decision to support its Petition for Writ of Certiorari is misplaced. *Gasperini* holds that an appellate court can review a trial court's denial of a motion for new trial based on an alleged excessive jury verdict and that such review must be under an abuse of discretion standard. Prior to *Gasperini*, the Supreme Court had never held that federal appellate courts had such authority. 518 U.S. at 434. *Gasperini* does not hold, as the District contends, that the Seventh Amendment permits the district courts to exercise substantial discretion in granting new trials in all situations. It is limited to situations involving excessive jury verdicts. Two of the appellate decisions cited by the Supreme Court, *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969) and *Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2d Cir. 1961), involved allegedly excessive jury verdicts. In the context of jury awards that are either excessive or against the weight of the evidence, a trial court's decision on a motion for a new trial does receive some deference by the appellate courts since it primarily involves consideration of the facts presented. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400, 110 S. Ct. 2447, 2458, 110 L. Ed. 2d 359 (1990) (district court's findings of fact reviewed under a deferential

standard). Such issues involving excessive verdicts generally arise only in personal injury actions when elements of damage such as pain and suffering cannot be quantified.

The District Court did not have such discretionary factual issues before it in this case when it granted a new trial. It simply applied the wrong law to the evidence. Deferential review is not accorded when legal issues are involved. *See Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392 (1996) (a court of appeals need not defer to the district court's resolution of a question of law); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948, 115 S. Ct. 1920, 1926, 131 L. Ed. 2d 985 (1995) (questions of law decided *de novo*). Certainly, the District Court attempted to make its Memorandum Opinion read as if the case involved the question of an excessive verdict. It mentions that the "jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience." (Pet., App. at 13) However, as the D.C. Circuit indicated, the evidence at trial established damages in excess of $12 million. (Pet., App. at 9) A verdict of less than half of this amount was within the range of the evidence and cannot be treated as excessive by the court. *See Langevine, supra*. The trial court committed legal error when it ignored this rule of law that was to be applied. Such legal error allows the trial court's finding to be set aside. *Pullman-Standard*, 456 U.S. at 287.

The District of Columbia attempts to undercut the controlling law set forth in *Langevine* by labeling it a "rule of thumb".[4] (Pet. at 19) However, it was binding precedent

4. *Langevine* states that "a jury's determination of damages may only be disturbed if it 'is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.' " 106 F.3d at 1024 (*quoting Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87, 96 (D.C. Cir. 1987)).



on the District Court which was entirely disregarded. Tri County cited and relied on *Langevine* in its brief that was filed with the D.C. Circuit. (Appellant's brief at 44) The District never mentioned *Langevine* in its brief and, to the extent that it now questions the validity of such opinion, has clearly waived this argument.

*Gasperini* is also not applicable for a second reason. It further states that "courts of appeals engage in review of district court excessiveness determinations, applying 'abuse of discretion' as their standard." 518 U.S. at 492 (citing *Grunenthal*, 393 U.S at 159). To the extent that an appellate court applies a stricter or more lenient standard of review than abuse of discretion, then it may be reversed. *See General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) and *First Options of Chicago, Inc. v. Kaplan, supra.*

At the same time, however,

> a decision calling for the exercise of judicial discretion "hardly means that it is unfettered by meaningful standards or shielded from *thorough* appellate review." *Albemarle Paper Co.*, 422 U.S., at 416, 95 S.Ct., at 2371. Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise.

*United States v. Taylor*, 487 U.S. 326, 336, 108 S. Ct. 2413, 2419, 101 L. Ed. 2d 297 (1988) (Emphasis supplied) "Independent appellate review necessarily entails a *careful consideration* of the district court's legal analysis. . . ." *Salve Regina College*, 499 U.S. at 232, 111 S. Ct. at 1221. (Emphasis supplied)

Abuse of discretion occurs when a court makes a factual finding that is clearly erroneous. *Cooter & Gell*, 496 U.S. at 386, 110 S. Ct. at 2450. It also occurs when it makes an error of law or when the court's discretion was guided by erroneous legal conclusions. *Koon*, 518 U.S. at 100, 116 S. Ct. at 2047-48.

The D.C. Circuit's opinion indicates that it reviewed the District Court's granting of a new trial under an abuse of discretion standard. There is no suggestion in the opinion that this standard was applied strictly or "more exactingly". The fact that the D.C. Circuit reviewed the record with close scrutiny does not enlarge or restrict the abuse of discretion standard.[5] It merely reflects thorough appellate review and careful consideration of the district court's legal analysis that are referred to in *United States v. Taylor, supra*, and *Salve Regina College v. Russell, supra*. A more searching inquiry of the record is not prohibited by *Gasperini*.

The District of Columbia relies upon an excerpt from the oral argument before the D.C. Circuit to support its contention that the abuse of discretion standard was applied too strictly. (Pet. at 22) This portion of the transcript merely refers to the standard to be applied by the trial court when it considers setting aside a jury verdict and granting a new trial. The D.C. Circuit did not discuss during oral argument the standard to be applied by an appeal court when it reviews such decisions. Further, any review of the actions of the D.C.

5. In *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156, 159, 89 S. Ct. 331, 333, 21 L. Ed. 2d 309 (1968), the Court expressed no difficulty with the court of appeals making "a *detailed appraisal of the evidence* bearing on damages" in order to determine if the trial court abused its discretion in denying a new trial motion. (Emphasis supplied).



Circuit must be based on its final opinion rather than statements made during oral argument. The D.C. Circuit's opinion indicates application of the abuse of discretion standard with no suggestion that it was applied "more exactingly".

## III.

## NO CONFLICT EXISTS AMONG THE CIRCUITS THAT WOULD JUSTIFY THE GRANTING OF THE DISTRICT OF COLUMBIA'S PETITION FOR CERTIORARI.

Contrary to the District of Columbia's position, there is no intolerable conflict among the Circuits over the standard of appellate review of new trial orders. The District of Columbia primarily relies upon *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) to establish a circuit split. Prior to *Medcom*, the Seventh Circuit applied a more exacting standard of review when the district court granted a new trial on damages. *See Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238, 247 (7th Cir. 1992); *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989); and *Matter of Innovative Construction Systems, Inc.*, 793 F.2d 875, 888 (7th Cir. 1986).

*Medcom* held, based upon *Gasperini*, that the abuse of discretion standard did not have to be applied "more exactingly". Instead, an ordinary abuse of discretion standard was to be applied. The D.C. Circuit utilized the same ordinary abuse of discretion standard in this case. *Medcom* does not even discuss if close scrutiny of the record is appropriate under an abuse of discretion standard of review.

The other decisions cited by the District of Columbia also do not reflect any disagreement or conflict with the approach taken by the D.C. Circuit. *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998), does not even address the issue of abuse of discretion. Both *Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2 (2d Cir. 1996), and *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1997), only state that appellate review of a denial of a motion to set aside the verdict as excessive is to an abuse of discretion standard. *Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987), was decided nine years before *Gasperini*. While it does label the approach contained in *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960) (*en banc*), *cert. denied*, 364 U.S. 835 (1960), as applying a stricter standard of review, this is an incorrect characterization. *Lind* only required a closer degree of scrutiny when a jury verdict is set aside as being against the weight of the evidence. It still applied an abuse of discretion standard to its review of the trial court's decision. *Lind*, 278 F.2d at 88.

Under these circumstances, no actual conflict exists among the different Circuit courts that would justify the granting of certiorari in this case.



## IV.

## THE D.C. CIRCUIT WAS CORRECT IN CONCLUDING THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE ORIGINAL JURY VERDICT AND GRANTING A NEW TRIAL.

In an effort to establish that important and fundamental issues are involved in this case, the District of Columbia mischaracterizes the nature of the earlier proceedings. It attempts to portray the case as an encroachment by the D.C. Circuit on the District Court's ability to make discretionary decisions in the context of reviewing a jury trial. As the D.C. Circuit's opinion makes clear, the trial court committed significant legal errors when it granted a new trial. It should not have determined that Tri County was unreasonable as a matter of law in failing to file an administrative appeal after Tri County had introduced evidence explaining such lack of action. The District Court ignored the holding in *Samaritan Inns, Inc., supra*, when it concluded that Tri County's proof of damages was speculative. It further disregarded *Langevine* when it held that the jury verdict of $5 million shocked its conscience. Lastly, the District Court was clearly wrong in stating that it prevented the District of Columbia from proving that the Tri County facility would never have been allowed to open or operate. There is no indication in the record that such exclusionary rulings were ever made by the District Court.

As a result, the District Court unquestionably abused its discretion in the sense that it committed legal error and relied on clearly erroneous facts when it granted a new trial. Whatever discretion a trial judge should have in granting a new trial, it does not include legal error and reliance on non-

existent facts. The D.C. Circuit was entirely correct in its reversal of the lower court's granting of a new trial because the District Court did abuse its discretion.

A remand to the D.C. Circuit would serve no purpose since the errors committed by the District Court in this case did not involve discretionary decisions in which it might be accorded some degree of deference. Whether the D.C. Circuit closely scrutinizes the record or not, the result will be the same. The District Court clearly abused its discretion in granting a new trial and such decision should be reversed.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 99-1953

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
v.
TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

# REPLY TO BRIEF IN OPPOSITION


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## TABLE OF CONTENTS


Page

ARGUMENT . . . . . 1

I. TRI COUNTY'S OPPOSITION RESTS ON A FATAL AND FUNDAMENTAL FLAW. . . . . 1

II. TRI COUNTY MISSTATES THE RECORD WHEN IT ASSERTS THAT THE DISTRICT OF COLUMBIA WAIVED THE ISSUE SET FORTH IN THE QUESTION PRESENTED. . . . . 2

III. TRI COUNTY PLAINLY ERRS IN ASSERTING THAT THE DECISION BELOW IS NOT IN CONFLICT WITH *GASPERINI* AND THE DECISIONS OF OTHER CIRCUITS. . . . . 5

IV. THIS COURT SHOULD NOT STAY ITS HAND BECAUSE OF ANY OF TRI COUNTY'S OTHER ARGUMENTS. . . . . 8

CONCLUSION . . . . . 9


## TABLE OF AUTHORITIES


*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*

*Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987) . . . . . 5, 6

*Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992) . . . . . 2

*Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.) (*en banc*), *cert. denied*, 364 U.S. 835 (1960) . . 2, 4, 6

*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988) . . . . . 4, 5

*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) . . . . . 5, 6, 7

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,

v.

TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

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## Reply to Brief in Opposition

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## ARGUMENT

### I. TRI COUNTY'S OPPOSITION RESTS ON A FATAL AND FUNDAMENTAL FLAW.

Tri County's Opposition rests on a fatal and fundamental flaw: its insistence that the D.C. Circuit's "more searching inquiry" standard for reviewing orders granting new trials, and similar standards in the Third, Fifth, Sixth and Eighth Circuits, are identical to the abuse of discretion standard adopted by this Court in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), and by the Second, Fourth, Seventh, Ninth and Eleventh Circuits. This error underlies, and thereby undermines, its waiver argument and its arguments that (1) the decision below does not conflict with *Gasperini*; (2) there is no inter-Circuit conflict; (3) the D.C. Circuit applied the correct standard of appellate review; and, (4) in the alternative, review should be denied because the D.C. Circuit would reach the same decision under the proper standard of appellate review.

The standard adopted by the D.C. Circuit, and the Circuits aligned with it, is not a directive that appellate courts should review case records with care (which, of course, they should always do). If Tri County were correct, the federal judiciary has squandered a great deal of time over a non-issue.

Instead, the "more searching inquiry" standard is a substantive standard under which the scope of appellate review is broad and the discretion of the district court to grant new trials is circumscribed "'in order to protect the litigants' [Seventh Amendment] right to jury trial.'" *Hutchinson v. Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992), quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir.), (*en banc*), *cert. denied*, 364 U.S. 835 (1960). By contrast, under the abuse of discretion standard, the scope of appellate review is circumscribed and the discretion of the district court is broad. In the latter instance, given the active oversight role the Seventh Amendment assigns to trial judges, an appellate court must "give the benefit of every doubt to the judgment of the trial judge" in view of his "unique opportunity to consider the evidence in the living courtroom context." *Gasperini*, 518 U.S. at 438-39 & 438 (internal quotation marks omitted).

## II. Tri County Misstates the Record When It Asserts that the District of Columbia Waived the Issue Set Forth in the Question Presented.

Tri County asserts that the District of Columbia did not argue that the standard of review is abuse of discretion until after the decision for which review is sought here. Opp. 7-9. This argument flatly misstates the record.

As Tri County admits, the Federal Rules of Appellate Procedure required it to set forth the standard of review in its opening brief in the court below. Opp. 7. That brief repeatedly stated that the standard of review was abuse of discretion. And the District expressly agreed with that standard.

More specifically, in its opening brief, under the "ARGUMENT" section, Tri County had a caption "A. THE FIRST



TRIAL - STANDARD OF REVIEW." Brief vi & 30. It then set forth four arguments why the new trial order should be overturned. Each of these arguments contained the following language in the caption: "THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT . . .." Brief vi, 31, 36, 44 & 45. In addition, the first sentence in each of these arguments was: "The standard of review on this issue is abuse of discretion." Brief 31, 36, 44 & 45. Tri County's statement of the corresponding four issues presented was comparably phrased: "DID THE DISTRICT COURT ABUSE ITS DISCRETION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT . . .?" Brief 2-3. As Tri County admits in this Court, the District agreed with this standard of review in its brief as appellee. Opp. 8 n.3. The District did not, however, as Tri County implicitly concedes, agree with Tri County's almost casual reference to "close scrutiny" in its general discussion of the standard of review.[1] Accordingly, the parties agreed on the standard of review.

At oral argument, however, it became apparent that the court below did not accept the abuse of discretion standard. Thus, when counsel for the District urged that the court, in order to reverse the new-trial order, "has to find that Judge Robertson abused his discretion, which is . . . a high stan-

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[1]Tri County, apparently in the belief that "close scrutiny" means only a careful examination of the record, mentioned this language only once when it stated that "[t]he trial court's decision to grant a new trial will be given close scrutiny in order to protect the litigants' right to a jury trial." Brief 30. We emphasized this language in our Petition because the court below, in fact, adopted this standard and evidently concluded that, despite Tri County's repeated invocation of the abuse of discretion standard, this single reference precluded a finding that it had waived the "close scrutiny" standard.

dard," the panel vigorously rejected the argument. Transcript of Argument 16 (Nov. 12, 1999). The court responded:

> THE COURT: **No, now wait, no, no, no[!]**
> THE COURT: **No[!]**
> THE COURT: **No. That's not what Hi[]-Lo[] says, does it?**

*Id.* (Emphases added to reflect the tenor of the responses).

*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988), of course, reflects the D.C. Circuit's current rules for ordering new trials and for appellate review of new trials. In contrast to the cases cited by the District in its brief, however, *Hi-Lo* requires the D.C. Circuit to give "'close scrutiny'" to new trial orders "'in order to protect the litigants' right to jury trial'" and correspondingly constrains the discretion of the district court to grant new trials. *Id.* at 647, quoting *Lind*, 278 F.2d at 90. Or, as the court put it at argument, "there is a very tough standard in this Circuit . . . of taking the case from the jury." Transcript 16.

In short, the District unquestionably argued before the decision below that an appellate court must give deference to a district court's decision to grant a new trial and can reverse only if it finds an abuse of discretion. See also Cert. Pet. 11. It is equally clear that the panel understood the District's proffered standard and decisively rejected it. See also App. 5 & 10 ("more searching inquiry" is required). And it did so even though Tri County repeatedly had urged that an abuse of discretion standard applied to its assignments of error.[2]

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[2]The foregoing also disposes of two of Tri County's related assertions: (1) the panel at argument was concerned only with the (continued...)



## III. TRI COUNTY PLAINLY ERRS IN ASSERTING THAT THE DECISION BELOW IS NOT IN CONFLICT WITH *GASPERINI* AND THE DECISIONS OF OTHER CIRCUITS.

Tri County's position that there is no conflict among the Circuits rests on misguided legal arguments and a misrepresentation of the Seventh Circuit's decision in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997).

A. Tri County argues that there is no difference between the abuse of discretion standard and the "more searching inquiry" standard applied in this case. As we already have explained, however, this is refuted by the very decision for which review is sought here, by *Gasperini*, and by the Circuit Court decisions cited in the Petition, including *Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987), and *Medcom*.

B. Tri County claims that the decision below does not conflict with *Gasperini* because *Gasperini* is limited to "excessive jury verdicts" and the district court here simply applied the "wrong law . . .." Opp. 9 & 10. See also Opp. 16 (The issues Tri County raised on appeal "did not involve discretionary decisions . . . which . . . might be accorded some degree

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[2](...continued)
scope of the district court's discretion and not with the standard of appellate review; and (2) the D.C. Circuit applied the usual abuse of discretion standard in this case. Opp. 12-13. At oral argument, the panel decisively rejected the abuse of discretion standard of appellate review and the concomitant expansion of the district court's discretion to grant new trials. Its decision in this case, in turn, expressly reflects its adherence to *Hi-Lo* and its progeny.

of deference."). This claim is frivolous, as Tri County's repeated invocation below of the abuse of discretion standard suggests. And Tri County was correct to invoke this standard given the issues it was raising on appeal: The district court's rulings that it failed to mitigate damages; that its evidence of lost profits was speculative; that the award of lost profits was excessive; and that the court properly excluded and struck from the jury's consideration the District's evidence that future community resistance and regulatory barriers would have doomed its soil remediation facility. Brief for Appellant vi & 31-46.[3]

C. Tri County argues that *Gill* misinterpreted *Lind*. Opp. 14. This is not true. The Fourth Circuit correctly understood the Third Circuit's standard for reviewing orders granting new trials on the ground that the jury's verdict is against the weight of the evidence and unquestionably rejected it as inconsistent with the Seventh Amendment. See Cert. Pet. 25. Indeed, even Tri County concedes that *Lind* "require[s] a closer degree of scrutiny when a jury verdict is set aside as being against the weight of the evidence." Opp. 14.

D. Tri County asserts that *Medcom* "does not even discuss if close scrutiny of the record is appropriate under an abuse of discretion standard of review." Opp. 13. This is flatly wrong. In *Medcom*, the Seventh Circuit ruled that

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[3]In support of this point, Tri County argues that the district court committed legal error because the D.C. Circuit has ruled that a verdict which is "within the range of the evidence [, no matter how flimsy,] . . . cannot be treated as excessive by the [district] court." Opp. 10. Assuming *arguendo* that the D.C. Circuit has adopted such an extraordinary rule, it is plain that such a rule strikes at the heart of the role the Seventh Amendment assigns to the district court and is thus unconstitutional. See Cert. Pet. 17.



*Gasperini* required it to abandon its "more exacting" standard of review, the standard which the D.C. Circuit continues to embrace, and to review grants of new trials "with somewhat more deference to the district court, utilizing an ordinary abuse of discretion standard . . .." 106 F.3d at 1397.

E. Tri County asserts that, although it advocated a close scrutiny standard in the court below, "[t]he D.C. Circuit utilized the same ordinary abuse of discretion standard in this case" as the Seventh Circuit did in *Medcom*. Opp. 13. This is manifestly not true. The D.C. Circuit expressly set forth its "more searching inquiry" standard twice and explained that this standard of review is necessary to ensure that the district court does not invade the province of the jury. App. 5 & 10. The law of the D.C. Circuit is that district court orders granting new trials are suspect and must be subjected to heightened appellate scrutiny to ensure that the right of civil litigants to a jury trial is protected.

In short, given the foregoing, this Court must draw several conclusions. The first is that Tri County, during briefing in the court below, operated under the mistaken premise that the abuse of discretion standard of appellate review is the same as the D.C. Circuit's "more searching inquiry" standard of review (and that it now clings to that mistaken premise to protect its undeserved jury verdict). The second is that this Court and the Circuits have drawn a sharp distinction between the two. The third is that the decision below squarely conflicts with *Gasperini* and with the decisions of several other Circuits, including the Fourth and Seventh, on the very important issue whether the Seventh Amendment's right to a jury trial requires appellate courts to strictly scrutinize orders granting new trials or whether the usual abuse of discretion standard applies to review of such orders.

## IV. THIS COURT SHOULD NOT STAY ITS HAND BECAUSE OF ANY OF TRI COUNTY'S OTHER ARGUMENTS.

The District's Petition plainly presents an important legal issue on which the decision of the court below is in conflict not only with *Gasperini* but also with the decisions of several other Circuits. Tri County attempts to obfuscate this point by several other arguments. None is meritorious.

A. Tri County accuses the district court of subterfuge -- "attempt[ing] to make its Memorandum Opinion read as if the case involved the question of an excessive verdict." Opp. 10. This accusation is ridiculous. The District urged that the verdict was excessive and that was one of the precise findings the Honorable James Robertson made. App. 13.

B. Tri County argues that review should be denied because the District is to blame for the fact that the first trial was truncated. Opp. 5. This is false. For example, the District introduced letters extending to Tri County an opportunity to be heard on suspension of its license and then stopping the project when it failed to respond. The court struck this evidence and thereby seriously crippled the District's failure-to-mitigate defense on Tri County's claim that its permit was unconstitutionally suspended because it was not given an opportunity to be heard. Upon reflection, the court found the damages award excessive because Tri County, as the court knew, had failed to "invest[] a penny to seek reinstatement of the unlawfully suspended building permit," even rebuffing a written post-suspension invitation to be heard. App. 13.[4]

---

[4]Tri County argues that it did not respond because it had already provided the information. Opp. 3. We disagree. See Brief (continued...)



C. Tri County asserts that "the District Court did not base its decision on . . . the exclusion of all testimony relating to the health and safety of the project . . .." Opp. 4. This too is false. In a refreshing display of candor, Judge Robertson assumed substantial responsibility for the trial's unjust outcome.[5] He should not be second-guessed in this respect.

## CONCLUSION

This is a case in which a district court judge, reflecting on the events of a trial over which he had just presided, concluded, rather courageously, that his evidentiary rulings had unfairly deprived the jury of information it needed to reach a just verdict and that, as a result, the jury had returned a grossly excessive ~~v~~verdict. A second jury, which heard the evidence that the judge had either struck or excluded, rendered a verdict of $100, rather than $5,000,000.

---

[4](...continued)
for Appellees 3-4, 9, 28 & 40. In any event, this argument is irrelevant because Tri County's constitutional claim was that it had been denied process, not that the suspension was substantively invalid under local law, and here, the District was affording it process.

[5]He wrote: "The jury's award of future profits . . . was based on expert testimony that should not have been received --, or, at least, should not have been received *without allowing the District . . . to adduce proof* that plaintiff's soil remediation facility would never have been permitted to operate." App. 13 (emphasis added). He also wrote that the damages award was grossly excessive "particularly in view of the realistic prospect, *which I did not permit the defendants to prove at trial*, that there would be continued community resistance . . . and a very real likelihood that the District . . . would have closed down the remediation facility sooner or later in any event, or that it never would have been permitted to commence operations at all." App. 13-14 (emphasis added).

Under *Gasperini*, and the venerable principles it invokes, the trial judge's order was subject to a deferential standard of appellate review and should have been reversed only if it constituted an abuse of discretion. Instead, the court below applied a heightened standard of review and substituted its judgment for that of the district court.

Review of this decision is necessary not only because the court below applied the wrong legal standard, and then refused to correct its error even when *Gasperini* was brought to its attention, but also because there is an unmistakable conflict among the Circuits on the fundamental issue of the respective roles of district and appellate courts in awarding new trials.

Respectfully submitted,

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(5)

Supreme Court, U.S.
FILED
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CLERK

No. 99-1953

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
v.
TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

# JOINT APPENDIX

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Petition for a Writ of Certiorari filed on June 2, 2000
Certiorari granted on September 26, 2000

163 pp
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## TABLE OF CONTENTS


Page

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (January 18, 2000) . . . . 1

Judgment on the Verdict in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. April 20, 1998) . . . . . 11

Memorandum Order in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. July 23, 1998) . . . . . 12

Judgment on the Verdict in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. February 4, 1999) . . . . . 15

Order of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (March 8, 2000) (denying petition for rehearing ) . . . . . 16

Order of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (March 8, 2000) (denying petition for rehearing *en banc* ) . . . . . 17

JOINT APPENDIX


Relevant Docket Entries: *Tri County Industries, Inc. v. District of Columbia, et al.*, Civil Action No. 94-CV-2014 (D.D.C.) . . . . . 1

Relevant Docket Entries: United States Court of Appeals for the District of Columbia Circuit, Appeal No. 99-7028 . . . . . 7

DE 45: Amended Complaint -- Excerpts . . . . . 8

DE 43: Answer to Amended Complaint -- Excerpts . . . 9

DE 46: Memorandum Opinion (D.D.C. January 17, 1996) . . . . . 10

Decision (D.C. Cir. January 14, 1997) . . . . . 18

DE 67: Memorandum Opinion (July 25, 1997) . . . . . 31

Trial Transcript & Exhibits, Civ. No. 94-CV-2014 (April 14-17, 1998) . . . . . 35

Testimony of Karleen Donnells, Vice President of Tri County Industries . . . . . 35
Testimony of John Wegznek, certified public accountant . . . . . 38
Testimony of Glenn Selzer, President of Tri County Industries . . . . . 39
Testimony of Jonathan L. Farmer, counsel for Tri County Industries . . . . . 53
Testimony of Alfred Dishian, business consultant 55
Testimony of Donald G. Carter, consulting engineer . . . . . 58
Testimony of Vincent DiRenzo, environmental consultant . . . . . 60





Deposition Testimony of Larry Johnson . . . . . 64
Testimony of Joel M. Morse, professor of financial economics . . . . . 65
Deposition Testimony of Harry Thomas . . . . . 70
Deposition Testimony of Hampton Cross . . . . . 71
Deposition Testimony of Francine Howard James, Executive Officer, D.C. Board of Appeals and Review . . . . . 72
Argument of Counsel . . . . . 72
Ruling of Court on defendants' motion for judgment as a matter of law . . . . . 77
Testimony of DCRA Inspector Juan Berra-yarza . . . . . 80
Testimony of DCRA Inspector Phillip Thomas . 83
Testimony of DCRA Employee Lennox Simon . 85
Testimony of DCRA Director Hampton Cross . . 89
Testimony of DCRA Chief James Sweeney . . . 93
Testimony of BAR's Executive Officer Fran-cine James . . . . . 103
Colloquy: Court and Counsel . . . . . 104
Proposed Testimony of Alfred Siess . . . . . 105
Colloquy: Court and Counsel . . . . . 112
Colloquy: Court and Counsel . . . . . 120
Defendants' renewal of their motion for judg-ment as a matter of law . . . . . 120
Court directives to jury . . . . . 122
Jury Instructions -- excerpts . . . . . 123
Plaintiff's Exhibit 3 . . . . . 126
Plaintiff's Exhibit 4 . . . . . 130
Plaintiff's Exhibit 44 . . . . . 132
Plaintiff's Exhibit 54; D.E. 17 -- Exh. A . . . 133
Plaintiff's Exhibit 56 . . . . . 139
Plaintiff's Exhibit 57 . . . . . 143
Defendants' Exhibit 8 (October 15, 1993 letter) 145
Defendants' Exhibit 10 (December 6, 1993 letter) . . . . . 148

## Relevant Docket Entries

**Tri County Industries, Inc. v. District of Columbia, *et al.***
**Civil Action No. 94-CV-2014 (D.D.C.)**

[TCI = Tri County Industries, Inc.]

9/20/94 -- DE 1: COMPLAINT filed by TCI; jury demand

10/17/94 -- DE 8: ANSWER TO COMPLAINT [1-1] by defendants DC, SHARON PRATT KELLY, DEPT. OF CONSUMER, HAMPTON CROSS, FERIAL BISHOP; jury demand

9/27/95 -- DE 28: ORDER by Judge James Robertson: granting motion for leave to file amended complaint [24-1] by TCI

9/27/95 -- DE 29: MOTION filed by TCI for summary judgment; exhibits (51)

9/27/95 -- DE 45: AMENDED COMPLAINT by TCI [1-1]; jury demand

10/25/95 -- DE 32: CROSS MOTIONS by defendants to dismiss, or, in the alternative for summary judgment; Exhibits (7)

12/5/95 -- DE 39: SUPPLEMENTAL MEMORANDUM by defendants in support of cross motion for summary judgment [32-2]

12/20/95 -- DE 43: ANSWER TO AMENDED COMPLAINT by defendants; jury demand

1/17/96 -- DE 46: MEMORANDUM OPINION by Judge James Robertson

1/17/96 -- DE 47: ORDER by Judge James Robertson: granting cross motion for summary judgment [32-2] by defendants with respect to Count I of the amended complaint; denying motion for partial summary judgment [29-1] by TCI dismissing Count II of the amended complaint for failure to state a claim upon which relief can be granted; declining to exercise supplemental jurisdiction over Counts III and IV of the amended complaint; dismissing complaint [1-1] with prejudice.

1/29/96 -- DE 49: NOTICE OF APPEAL by TCI from order dismissing complaint [1-1] with prejudice. [47-1], order [47-2], entered on January 17, 1996.

2/26/97 -- DE 52: CERTIFIED COPY of judgment filed in USCA dated 1/14/97 on appeal [49-1], vacating decision of USDC and remanding for further proceedings OPINION USCA # 96-7022

4/15/97 -- DE 56: MOTION by TCI to strike affirmative defense of failure to mitigate damages

4/15/97 -- DE 58: MOTION by TCI for summary judgment on the issue of failure to mitigate damages

5/23/97 -- DE 61: OPPOSITION by defendants to motion to strike affirmative defense of failure to mitigate damages

5/23/97 -- DE 62: OPPOSITION by defendants to motion for summary judgment on issue of failure to mitigate damages [58-1]

5/23/97 -- DE 63: MEMORANDUM by defendants on damages issues



5/30/97 -- DE 64: REPLY by TCI to defendants' memorandum on damages issues

5/30/97 -- DE 65: REPLY by TCI to defendants' opposition to TCI's motion for summary judgment on issue of failure to mitigate damages

5/30/97 -- DE 66: REPLY by TCI to defendants' opposition to motion to strike affirmative defense of failure to mitigate damages

7/25/97 -- DE 67: MEMORANDUM OPINION by Judge James Robertson

7/25/97 -- DE 68: ORDER by Judge James Robertson: denying motion for summary judgment on issue of failure to mitigate damages [58-1] by TCI; denying motion to strike affirmative defense of failure to mitigate damages [56-1] by TCI

12/11/97 -- DE 74: MOTION by TCI in limine to exclude testimony or argument involving the safety of TCI's project

12/11/97 -- DE 75: MOTION by TCI in limine to exclude stop work order dated September 22, 1993

12/11/97 -- DE 76 -- MOTION by TCI to amend ad damnum clause in amended complaint

12/11/97 -- DE 77: MOTION by TCI in limine to exclude defense of failure to mitigate damages

12/16/97 -- DE 79: MOTION by defendants for summary judgment on damages; exhibits (4)

12/17/97 -- DE 80: MEMORANDUM in support of defendants' motion for summary judgment on damages [79-1]; exhibits (5)

12/31/97 -- DE 82: OPPOSITION by defendants to motion to exclude testimony or argument involving safety of TCI's project [74-1]

12/31/97 -- DE 83: OPPOSITION by defendants to motion to exclude stop work order dated September 22, 1993 [75-1]

1/6/98 -- DE 84: SUPPLEMENTAL MEMORANDUM by defendants in support of opposition [82-1]

1/8/98 -- DE 85: REPLY by TCI to defendants' opposition to motion to exclude testimony or argument involving the safety of TCI's project

1/9/98 -- DE 86: REPLY by TCI to defendants' opposition to motion to exclude stop work order dated September 22, 1993

1/15/98 -- DE 87: OPPOSITION by TCI to defendants' motion for summary judgment on damages [79-1]

2/4/98 -- DE 89: REPLY by defendants to TCI's opposition to motion for summary judgment on damages [79-1]

3/4/98 -- DE 91: MEMORANDUM AND ORDER by Judge James Robertson: denying motion of defendants for summary judgment on damages [79-1]; denying motion to exclude defense of failure to mitigate damages [77-1] by TCI; granting motion by TCI to amend ad damnum clause [76-1]; denying motion by TCI to exclude stop work order dated September 22, 1993; denying



motion by TCI to exclude testimony or argument involving safety of TCI's project [74-1]

3/17/98 -- DE 94: PRETRIAL STATEMENT by TCI; exhibits (4)

3/17/98 -- DE 95: MEMORANDUM (Pretrial) by TCI on damages and duty to mitigate damages

3/25/98 -- DE 98: PRETRIAL STATEMENT by defendants

3/27/98 -- DE 99: MOTION by TCI to preclude factual witnesses from testifying

3/31/98 -- DE 101: OBJECTIONS by TCI to defendants' proposed exhibits

4/6/98 -- DE 102: OPPOSITION by defendants to TCI's motion to preclude factual witnesses from testifying [99-1]

4/7/98 -- DE 103: OBJECTIONS by defendants to TCI's exhibit list

4/14/98 -- JURY TRIAL before Judge James Robertson: jury of 8 sworn and selected; trial begun

4/15/98 -- JURY TRIAL before Judge James Robertson: same jury of 8 resumed

4/16/98 -- JURY TRIAL before Judge James Robertson: same jury of 8 resumed

4/17/98 -- JURY TRIAL before Judge James Robertson: same jury of 8 resumed and concluded; Jury deliberations began and concluded; Judgment in favor of plaintiff in the amount of $5,000,000.00;

notes (1) and verdict form filed in court jacket.

4/17/98 -- DE 106: VERDICT FORM
4/17/98 -- DE 107: JURY INSTRUCTIONS

4/20/98 -- DE 104: JUDGMENT on Verdict in favor of TCI against defendant DC in the amount of $5,000,000.00

4/27/98 -- DE 111: TRANSCRIPT of trial for 4/14/98
4/27/98 -- DE 112: TRANSCRIPT of trial for 4/16/98
4/27/98 -- DE 113: TRANSCRIPT of trial for 4/15/98
4/27/98 -- DE 114: TRANSCRIPT of trial for 4/17/98

5/4/98 -- DE 115: MOTION by defendants for judgment notwithstanding the verdict or, in the alternative, for a new trial

5/18/98 -- DE 116: OPPOSITION by TCI to motion [115-2]

6/4/98 -- DE 118: SUPPLEMENTAL MEMORANDUM by TCI in opposition to motion [115-2]

6/16/98 -- DE 120: SUPPLEMENTAL MEMORANDUM by defendants in support of their motion for new trial [115-2]

7/23/98 -- DE 124: MEMORANDUM AND ORDER by Judge James Robertson: granting motion for new trial [115-2] unless within 30 days after entry of this order, TCI accepts remittitur of jury's verdict to $1,000,000

8/24/98 -- DE 125: RESPONSE by TCI to offer of remittitur

12/8/98 -- DE 132: MOTION by TCI for reconsideration of the 7/23/98 order [124-1]



2/4/99 -- DE 155: JUDGMENT on verdict in favor of plaintiff TCI in the nominal amount of $100.00

2/23/99 -- DE 158: NOTICE OF APPEAL by plaintiff TCI from judgment order [155-1] entered on: February 4, 1999.

**Relevant Docket Entries**

**United States Court of Appeals**
**for the District of Columbia Circuit**
**Appeal No. 99-7028**

6/28/99 -- BRIEF filed by Appellant, Tri County Industries, Inc.
8/12/99 -- BRIEF filed by Appellees, District of Columbia, et al.
8/26/99 -- REPLY BRIEF filed by Appellant
11/12/99 -- ORAL ARGUMENT HELD before Edwards, Silberman, Henderson
11/18/99 -- LETTER filed by counsel for Appellees in response to questions raised at oral argument
11/22/99 -- LETTER filed by Appellant in response to Appellees' 11/18/99 letter
11/23/99 -- LETTER filed by Appellees in reply to Appellant's 11/22/99 letter
1/18/00 -- JUDGMENT for the reasons stated in the accompanying opinion
1/18/00 -- OPINION for the Court filed by Judge Henderson
2/17/00 -- PETITION for rehearing and PETITION for rehearing en banc filed by Appellees
3/8/00 -- PER CURIAM ORDER, In Banc, denying petition for rehearing en banc
3/8/00 -- PER CURIAM ORDER filed denying petition for rehearing

**[DE 45: AMENDED COMPLAINT -- EXCERPTS]:**

**AMENDED COMPLAINT**

(For Damages -- Violations of Constitutional Rights to Due Process; Unconstitutional Impairment of Contracts; Tortious Interference with Contracts; Tortious Interference with Prospective Economic Advantage)

* * *

11. On information and belief, various other entities and individuals, not made Defendants herein, whose identities or conduct are presently unknown to the Plaintiff, have participated with Defendants in the violations and tortious actions alleged herein and have performed acts and made statements in furtherance thereof.

12. In July, 1992, the Plaintiff initially made application with DCRA to obtain all required permits to operate a soil remediation facility at 2115 Bryant Street, N.E.

13. This facility was designed to treat and clean soil that had been contaminated with gasoline, diesel oil, fuel oil and kerosene. It was not intended to treat any hazardous waste material.

14. DCRA conducted an extensive review of the Plaintiff's application to construct and operate this facility, including, but not limited to visits to this site. Such review resulted in the Environmental Regulation Administration issuing to the Plaintiff on December 11, 1992, an air quality operating permit for this project. On December 22, 1992, the same Administration further approved the project to proceed without the filing of an environmental impact statement.



**[DE 43 -- ANSWER TO THE AMENDED COMPLAINT -- EXCERPTS]:**

ANSWER OF DEFENDANTS TO THE AMENDED COMPLAINT

* * *

11. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraph "11."

12. Defendants admit the allegations stated in paragraph "12."

13. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraph "13."

14. Defendants admit the allegations stated in the first sentence of paragraph "14", and deny those stated in the second sentence therein.

**[DE 46 – MEMORANDUM]:**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| TRI-COUNTY INDUSTRIES, INC. | : | |
| Plaintiff, | : | |
| v. | : | Civil Action No. |
| | : | 94-2014 (JR) |
| DISTRICT OF COLUMBIA, *et al.*, | : | **FILED** |
| Defendants. | : | JAN 17 1996 |

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

**MEMORANDUM**

Plaintiff Tri-County Industries, Inc., a Maryland corporation in the business of removing underground fuel storage tanks and remediating contaminated soil, alleges that the District of Columbia, and various of its agents acting in their official capacities, illegally suspended the building permit and air quality permit issued to Tri County for the construction of a soil remediation facility. Tri-County asserts claims under 42 U.S.C. § 1983 for violation of its due process rights and for unconstitutional impairment of contract. Tri-County also asserts common law claims. Before the Court are Tri-County's motion for partial summary judgment and the motion of defendants to dismiss or for summary judgment.

**I. Background.**

In July 1992, Tri-County applied to D.C.'s Department of Consumer and Regulatory Affairs (DCRA) for the permits necessary to build and operate a new soil remediation facility at 2215 Bryant Street, N.E.[1] On December 11 of the same year, DCRA's Environmental Regulation Administration (ERA) issued an air quality operating permit that was to be



valid upon the issuance of a building permit. On December 22, ERA notified Tri-County that the soil remediation project could proceed without the filing of an environmental impact statement, but that the "project is still governed by all other applicable District and Federal laws and regulations and will be subject to normal reviews during the permitting and construction process." On February 26, 1993, DCRA issued building permit No. B378978, permitting Tri-County to renovate a warehouse to accommodate the soil remediation plant.

On September 7, 1993, when the warehouse renovation work was in progress and Tri-County was awaiting the delivery of its soil remediation equipment, ERA issued a citation charging Tri-County with occupying the site as a soil remediation facility -- storing 500 tons of contaminated soil at the site -- without a certificate of occupancy. The citation required payment of a $500 fine within fifteen days. Tri-County did not pay the fine.

On September 20, 1993, representatives of Tri-County, DCRA, and D.C.'s Department of Housing and Community Development (DHCD), D.C. Councilmember Harry T. Thomas, and some 100 to 200 citizens attended a community meeting called by neighbors of the Bryant Street site to protest the location of the soil remediation facility in their neighborhood. During the meeting, Merrick Malone, a representative of DHCD, stated his agency's concerns about the facility's location, in view of the number of existing neighborhood residents and DHCD's plans to locate a new housing project nearby. After hearing that concern and others stated at the meeting, Hampton Cross, then acting director of DCRA, announced that his agency would re-evaluate the potential environmental impact of the soil remediation project on the

community and that Tri-County's permit would be suspended pending the re-evaluation.

Two days later, on September 22, DCRA posted a "stop work order" at the plant site.[2] On October 15, DCRA sent a letter to Tri-County requesting more information about the proposed plant and its potential environmental impact on the community. Tri-County did not respond.

On December 6, having received no response from Tri-County, DCRA rescinded the air quality permit and environmental approval letter issued on December 11 and December 22, 1992. DCRA also notified Tri-County that it would move to revoke the building permit (after procedures and a hearing in accordance with local law), and that Tri-County must immediately remove all contaminated soils from the site.

Tri-County sought no relief from the suspension of the building permit on September 20, or the stop work order of September 22, or the DCRA request for more information on October 15, or the rescission and revocation actions of December 6. Nor did Tri-County seek administrative or judicial review of any of these actions. Instead, Tri-County takes the position today that the September 20, 1993, suspension rendered the project economically unfeasible. Tri-County filed this action on September 20, 1994.

## II. Due Process

The complaint alleges that defendants' September 20 suspension of the building permit and its December 6 rescission of the environmental approval violated the procedural and substantive due process guarantees of the United States Constitution. The undisputed facts provide no support for those



allegations, however, and defendants are entitled to summary judgment on plaintiff's due process claims.

### a. Substantive due process

Neither the Supreme Court nor the Court of Appeals for this Circuit has enunciated an objective standard for deciding which governmental lapses are substantive due process violations redressable under 42 U.S.C. § 1983. The Court of Appeals has said, however, that "a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities" and that "only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights qualifies for protection under § 1983." *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988). Moreover, "inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute." *Id.* The *Silverman* court cited with approval a First Circuit decision holding that "purposeful, malicious action" is a prerequisite to a substantive due process claim. *See Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 103 (1st Cir. 1977).

Applying those tests to the undisputed facts of this case requires a finding that Tri-County's substantive due process rights were not violated by the District's action. The 500 tons of contaminated soil found at the construction site led to the issuance of a civil citation to Tri-County on September 7. That violation alone, under D.C. law, triggered Director Cross's discretionary authority to revoke plaintiff's building permit summarily, if he determined that the infraction posed a threat to the health and safety of the District's citizens and had not been remedied in the time allotted. *See* D.C. Con-

struction Code § 112.9(3) (1992 Supp.). Even if Director Cross incorrectly assessed the danger to area residents or miscalculated the time within which Tri-County should remove the soil, the temporary suspension of the building permit -- which was not a revocation -- was at most negligent. Director Cross's conduct was not the substantial and malicious infringement of District law that is the stuff of a due process violation.

DCRA's subsequent rescission of Tri-County's environmental approval on December 6 was justified by Tri-County's failure to deal with the civil citation or to address the September 22 stop work order and its further refusal to respond to DCRA's October 15 request for information. *See* D.C. Environmental Policy Act of 1989, D.C. Code § 6-981 et seq. (1995 repl.). Again, even if this decision was in error, it was at most negligent and did not amount to a denial of Tri-County's substantive due process rights.

**b. Procedural due process**

Tri-County also complains that the guarantee of procedural due process was denied by Director Cross's impromptu suspension of its building permit without notice and a pre-suspension hearing.

The contours of procedural due process are flexible and depend upon the circumstances of a given case. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). At bottom, due process requires some kind of notice and a hearing before the *final* deprivation of a property interest. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Propert v. District of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991). Interim suspensions of licenses and temporary seizures of property may be undertaken without a pre-deprivation hearing, provid-



ed that there is a sufficient factual basis for the action and that prompt administrative or judicial review of the merits of the decision is available. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Cokinos v. District of Columbia*, 728 F.2d 502 (D.C. Cir. 1983).

The suspension announced by Director Cross at the September 20, community meeting was not a "final deprivation" of Tri-County's asserted property interest in the building permit. Rather, it was akin to the "interim suspension" reviewed in *Barry v. Barchi, supra*. What Director Cross said on September 20 was that he would suspend the permit pending further study of the project's potential environmental impact. Formal action to revoke the permit did not begin until December 6, after Tri County failed to respond to DCRA's request for information.

I find on the basis of the undisputed facts both (1) that Director Cross had sufficient grounds upon which to impose an interim suspension for the purpose of gathering further information about the project's environmental impact on the surrounding community, and (2) that Tri-County had adequate post-deprivation remedies at its disposal with which to fight the permit suspension.

It is undisputed that Tri-County was cited for storing some 500 tons of contaminated soil at the Bryant Street facility two weeks prior to the suspension and that Tri-County neither removed the soil nor otherwise responded to the citation prior to the issuance of the stop work order on September 22. Tri-County's history of noncompliance with District environmental, building and zoning laws, the illegal presence of contaminated soil at the site, and the concerns about life safety raised by DHCD were enough for Director Cross, after consultation with his staff, to decide that more

information was needed. "At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements." *Barchi*, 443 U.S. at 65.

Tri-County could have sought, but did not seek, an expedited administrative hearing within 72 hours of the suspension. At such a hearing, the burden of justifying the suspension would have been the Director's. D.C. Code § 6-2706 (1995 repl.); D.C. Construction Code § 112.13 (1992 Supp.). If the result of the expedited hearing had been adverse to Tri-County, Tri-County had the right to a review before the D.C. Board of Appeals and Review. D.C. Construction Code § 112.14. Tri-County also could have sought, but did not seek, direct review of the suspension in the D.C. Court of Appeals pursuant to D.C. Code § 1-1510. And Tri-County could have sued, but did not sue, for injunctive relief in D.C. Superior Court or petition for a writ of mandamus in the D.C. Court of Appeals.

Tri-County's failure to pursue any of the post-suspension remedies available to it give a hollow ring to its allegations of injury. Even if Director Cross's decision to suspend the permit was not adequately grounded, Tri-County offers no evidence that the passage of a few days -- the amount of time deeded for the first level of administrative review -- resulted in any of the losses alleged in the complaint. Tri-County's alleged injury from the September 20 suspension was *de minimis* if not ephemeral.

**III. The Remaining Claims**

Tri-County has not developed or argued the claim for unconstitutional impairment of contract that was set forth in its amended complaint, and in that complaint Tri-County did not



allege the existence of any contractual relationship with which the District interfered. Rather, the impairment claim as stated relates only to *prospective* contractual relations -- and interference with prospective business advantage is not a constitutional tort. Accordingly, Count II must be dismissed for failure to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).

Having decided to dismiss all the claims over which I have original jurisdiction, I decline to exercise supplemental jurisdiction over plaintiff's common law claims of tortious interference with contract and interference with prospective business advantage. 28 U.S.C. § 1367(c).

An appropriate order is issued with this memorandum.

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[1]During the previous year, under the name of Clean Earth, Inc., Tri-County had operated a soil remediation facility at 1911 New York Avenue, N.E. Tri-County closed that operation, however, after it was found in violation of city zoning laws.

[2]The basis and the import of the stop work order are disputed. Tri-County maintains that it was issued because of its failure to pay the fine that was due fifteen days after September 7 and points to the notation of "no c of o" on the face of the order -- presumably "no certificate of occupancy," which had been the basis for the September 7 citation. Defendants, on the other hand, argue that the stop work order implemented Mr. Cross's announcement at the September 20 meeting that he was temporarily suspending Tri-County's building permit.

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued October 10, 1996 Decided January 14, 1997

No. 96-7022

ORIGINAL

TRI COUNTY INDUSTRIES, INC., A MARYLAND CORPORATION,
APPELLANT

United States Court of Appeals
For the District of Columbia Circuit

v.

FILED JAN 14 1997

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, ET AL.,
APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 94cv02014)

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*Frank J. Emig* argued the cause and filed the briefs for appellant.

*Martin B. White*, Assistant Corporation Counsel, argued the cause for appellees. *Charles F.C. Ruff*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Lutz Alexander Prager*, Assistant Deputy Corporation Counsel, were on the brief with him.

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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Before: EDWARDS, *Chief Judge*, WILLIAMS and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: On September 20, 1993 the acting director of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), Hampton Cross, summarily and without a hearing suspended a building permit issued to Tri County Industries, Inc. Tri County contends that the suspension deprived it of its property without due process of law, in violation of the Fifth Amendment. Although we reject its "substantive due process" claim, we agree that the suspension violated Tri County's procedural rights.

* * *

Tri County is in the business of decontaminating soil tainted with oil and other hazardous materials. In July 1992 it applied to the District of Columbia government for a building permit to convert an empty warehouse in Washington, D.C. into a facility for its decontamination work. In pursuing the application, it sought and obtained both an air quality permit and a waiver of the requirement that it file an environmental impact statement. Both were prerequisites to the issuance of Tri County's building permit. See District of Columbia Municipal Regulations §§ 20-200.1, 20-7200.1.

On February 26, 1993 the DCRA issued the building permit. Its licensing in place, Tri County completed some work renovating the facility, but nearly six months later was not yet ready to begin operations, primarily because of delays in the delivery of the decontaminating equipment. On September 7 it was issued a citation for storing soil at the facility without the required certificate of occupancy.

In the meantime, public opposition to the project had grown. On September 20, 1993 D.C. officials held a public meeting, attended by residents of the nearby community, representatives of Tri County, Hampton Cross of the DCRA, and one Merrick Malone, a representative of D.C.'s Department of Housing and Community Development. The meeting

was by all accounts a loud and sometimes unruly affair. In the course of it Malone stated, incorrectly as it later turned out, that a new public housing project was to be built immediately adjacent to the facility. Cross thereupon stated that he was suspending Tri County's building permit, to the applause of the crowd. According to his later testimony, he acted on the basis of Malone's statement. This suspension, Tri County contends, also suspended its air quality permit.

Two days later, on September 22, Tri County was issued a stop work order for continuing operations without a certificate of occupancy in violation of the September 7 citation. Tri County took no action to challenge either the September 20 suspension, which all parties now agree had no legal basis at all, or the stop work order, which is not challenged here and which all agree was a legally sufficient bar to Tri County's continuing work on the facility. See District of Columbia Municipal Regulations § 12–118.0.

More trouble followed. On October 15, 1993, Tri County was sent a letter by an official working for Cross requesting additional information on the environmental effects of the project. This request was also of dubious legal authority. Although it cited authorization from § 4(c)(3)(C) of the District's Environmental Policy Act (D.C. Code § 6–983(c)(3)(C)), the review process referenced in that section presumably had ended when the waiver was granted. In any case, Tri County had already answered many of the same questions as part of that original review process. Tri County did not respond. On December 6, Cross sent another letter, again without clear basis in the D.C. Code, rescinding the environmental waiver and stating that the District would soon start proceedings to revoke the building permit. In fact it appears that the District never did start the revocation proceedings. (In all probability the permit would have expired by now as a result of the permittee's abandonment of the authorized work. See District of Columbia Municipal Regulations § 12–112.8.) Tri County did nothing in response to this last missive except to remove the soil that had been the basis of the September 7 citation.



One year to the day after the fateful public meeting, Tri County filed suit in federal court under 42 U.S.C. § 1983, alleging deprivation of its property without procedural or substantive due process. It identifies as deprivations not only the suspension of its building permit on September 20, 1993 but also the implied simultaneous suspension of its air quality permit on the same date and the explicit rescission of its environmental waiver on December 6, 1993.

The district court granted the District's motion for summary judgment. It rejected the substantive due process claim on the ground that Cross's actions were at most negligent and the procedural due process claim on the ground that the building permit suspension was only an "interim suspension" for which Cross had "sufficient factual basis" and for which prompt review was available, citing *Barry v. Barchi*, 443 U.S. 55, 64 (1979). See *Tri-County Industries, Inc. v. District of Columbia*, 932 F. Supp. 4, 6, 7 (D.D.C. 1996). We review de novo. See *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995).

* * *

We first dispose of Tri County's claim that the implied suspension of the air quality permit on September 20, and the explicit rescission the environmental waiver on December 6, were deprivations that require our review. As to the air quality permit, the only ground for regarding it as suspended at all is the idea that it was joined at the hip with the building permit, so that the suspension of the building permit equally suspended the air quality permit. That may well be true: the letter issuing the permit says that it will not become valid (as authorization for a stationary source of air pollution) until a valid building permit is received by the issuing office. See letter of December 11, 1992 to Tri County from the Environmental Regulation Administration of the DCRA. But it would seem to follow that reactivation of the building permit would reactivate the air quality permit. Accordingly, it is hard to see how the latter's suspension adds anything to that of the building permit.

Of course the air quality suspension might generate an additional issue *if* the District defended the suspension (if indeed there was a suspension) as an application of procedures explicitly laid out for suspension of air quality permits; in that event we would be called on to review the constitutionality of the specified procedures. But the District makes no such claim. Rather, as we discuss in detail below, since the suspension of both permits did not fit any *authorized* procedure, we evaluate Cross's act, for procedural due process purposes, by inferring a hypothetical procedure from his actual conduct. That conduct was, of course, identical for both permits. Accordingly, the air quality permit seems to add nothing to the case that is not encompassed in analysis of the building permit.

Tri County's attack on the rescission of the environmental waiver fails for a different reason. While the air quality permit is legally stated as a prerequisite to construction and operation of a major stationary source (apart from the need for a building permit), the waiver is merely a step towards the acquisition of the building permit. District law requires that the environmental impact of a "major action" be evaluated "before an agency shall approve any major action, or issue any lease, permit, license, certificate, or other entitlement" approving the action. See District of Columbia Municipal Regulations § 20–7200.1. The waiver was simply an administrative finding that no more was required by way of satisfying that requirement for issuance of the building permit. But the due process clauses (here, that of the 5th Amendment, see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)) protect persons only against deprivations of life, liberty or property. While satisfaction of each of the many steps toward issuance of a building permit (conceded by the District to be a property right) is undoubtedly a useful milestone, Tri County offers no authority for the proposition that an agency "deprives" an applicant of "property" whenever it backtracks on a prior favorable finding on one of those steps, independently of withdrawal of the permit itself.

* * *



*"Substantive" due process*

Tri County's substantive due process claim is not crystal clear. In part the argument appears to be that the District's conduct was a taking of its property, unconstitutional because it was without just compensation. Tri County says that the District's "illegal and improper actions" inflicted "financial losses and delays" which in turn forced Tri County to abandon its plans and rendered the project "worthless." See Amended Complaint at 22. As to this claim, the District's ripeness defense is clearly sound. Under *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), a plaintiff advancing a claim for just compensation under the Taking Clause must have pursued its administrative remedies far enough to establish conclusively the effect of the regulations; only then can the court determine whether the impact has been draconian enough to make out a taking without just compensation. *Id.* at 186–97. As Cross's ukase of September 20, 1993 purported only to *suspend* Tri County's permit, and Tri County sought no relief, it cannot be said to have met this requirement.[1]

Alternatively Tri County appears to be invoking the more nebulous branch of substantive due process, which in our circuit requires the plaintiff to show "grave unfairness" by state (or District) officials. See *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988). There is some authority under which the very closeness of this claim to the taking argument might be a ground for rejecting it. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion

[1] Insofar as a suit for damages for a regulation that "goes too far" to be a permissible exercise of the police power is analytically distinguishable from a suit for failure to supply just compensation, see *Williamson*, 473 U.S. at 197, a failure to establish the impact of the suspension is similarly fatal, *id.* at 198–200. Finally, there is no claim for a "temporary taking." See *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 318 (1987).

of 'substantive due process' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (plurality opinion of Rehnquist, C.J.). But in this circuit at least, under *Silverman*, the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition. See also *Albright*, 510 U.S. at 286–87 (Souter, J., concurring) (noting that the Court has rejected the proposition that "the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure)"). We thus turn to the District's ripeness defense to the *Silverman* claim.

We identified in *Silverman* two ways in which a plaintiff might show the "grave unfairness" that it requires. "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief . . ." 845 F.2d at 1080. A mere state law violation does not give rise to a substantive due process violation, although "the manner in which the violation occurs as well as its consequences are crucial factors to be considered." *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 944 (D.C. Cir. 1988).

Thus, both types of "substantive" due process under *Silverman* have a substantiality requirement built in—unlike procedural due process, under which there may be recovery even for nominal damages. See *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978). This requirement is obvious enough in the first formulation—"a substantial infringement. . . ." And we think it implicit in the second as well. Theoretically, the reference to "trammel[ling] significant personal or property rights" might embrace trivial trammelling of an important property right, but we think our clear intent in *Silverman* was to confine the concept of substantive due process, itself oxymoronic, see *Gosnell v. City of Troy*, 59 F.3d 654, 656 (7th Cir. 1995), to actions that in their totality are genuinely drastic. Although *Williamson* addressed only taking claims,



its logic appears to us ordinarily to apply to *Silverman*-esque invocations of the due process clause: unless the victim of government imposition has pushed its local remedies to the hilt, it ordinarily will not be able to show the necessary substantiality. Given that on its face the order of September 20 was only a suspension, and that Tri County failed to pursue its apparent remedy under District of Columbia Municipal Regulations § 12–123.0 (allowing appeal of agency action within a department and then to Board of Appeals and Review), the claim must fail either for want of ripeness or on the merits.

We thus affirm the district court's dismissal of the substantive due process claim.

*Procedural due process*

We turn next to the procedural due process claim. Section 1983 explicitly treats the District of Columbia as a state, and there is no doubt that Hampton Cross acted "under color" of District law when he suspended Tri County's building permit. As noted above, the District concedes that the permit was a property right.

The district judge believed that Cross's act did not violate the due process cause because it was a mere "interim suspension," for which Cross had a "sufficient factual basis" and for which prompt review was available. *Tri-County Industries*, 932 F. Supp at 7. We disagree on the adequacy of Cross's grounds, but, more pertinently, the central issue is the adequacy not of his facts but of the *process* that he purported to follow.

The District acknowledges that the D.C. Code makes no provision at all for oral orders of suspension. So far as suspension itself is concerned, it points to District of Columbia Municipal Regulations § 12–118.1, which allows stop work orders in the event that work on a structure is being performed contrary to code or "in an unsafe and dangerous manner." Assuming that Cross's act could be equated with a stop work order (such as was issued two days later), the District's classification here would still not be pertinent.

Cross never claimed to have issued his pronouncement because of defects in the manner of Tri County's construction—and the sequence of events at the public meeting would have undercut any such claim. Rather, Cross candidly rested his suspension on Malone's statement that a public housing project would be built adjacent to Tri County's site. The District does not even suggest to us that there was some procedure for summary suspension based on word of such a prospect.

Given this total deficiency, one might expect the District to defend the due process claim on the theory that Cross's act was "random and unauthorized." See *Parratt v. Taylor*, 451 U.S. 527, 541 (1981). Because the losses from such an act are not the result of any state procedure, and because the state cannot predict when such losses will occur, such acts are not violations of the due process clause so long as there is an adequate post-deprivation remedy. *Id.* at 541–42; see also *Doe v. District of Columbia*, 93 F.3d 861, 868–69 (D.C. Cir. 1996).

In this case, however, the District has not only failed to argue *Parratt* but has explicitly thrown the point away, "assum[ing], for purposes of this appeal, that the doctrine of *Parratt* ... does not apply to actions by the Director of a government agency acting within the general scope of his authority." In fact, there is a circuit split on this issue. Compare *Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir. 1990) (en banc) (*Parratt* does apply to actions of high officials); *id.* at 1408–10 (Easterbrook, J., concurring), with *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc) (*Parratt* does not apply). It being inappropriate for us to resolve this sharply contested issue in a case where the parties appear to resolutely agree, we do not take that approach.

Evaluation of the adequacy of pre-deprivation procedures is governed by the balancing test stated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The first step, of course, is to identify the procedure, a matter normally accomplished by looking at state (or District) law. In the case of a random and unauthorized act, however, there is, by definition, no



explicitly articulated procedure. Accordingly, the procedure must be reverse engineered from the official's act—how might a procedure authorizing such an act have been stated? (An advantage of the view that *Parratt* applies even to the acts of high officials is that it renders this construction project unnecessary.)

Here Cross acted on the basis of an assertion by another government official, made at a public meeting attended by the representatives of the permit holder, that at some time in the indefinite future there would be a greater population than had formerly been expected near the site; thus more people were likely to be affected by whatever air pollution the project would emit once it was constructed and operational. He had no formal evidence before him suggesting that the calculations on which his own agency had relied in issuing both the environmental waiver and the air quality permit were unsound, with or without regard to the new (mis)information about the supposed increase in the population affected. Even summarizing this "procedure" most favorably to the District, it appears to permit indefinite suspension of a building permit on the basis of information about greater adverse impacts than projected at the time the permit was issued, expected to occur several years in the future, without any factual basis for believing that the information, if true, would justify revocation of the permit.

But to call the suspension "indefinite" requires another step—consideration of the speed of any post-deprivation hearing and possible correction. See *Barry v. Barchi*, 443 U.S. at 61, 66 (suspension of horse trainer's license without pre-deprivation hearing unconstitutional because neither rule nor practice applied to trainer assured timely post-deprivation hearing); *Cokinos v. District of Columbia*, 728 F.2d 502, 503 (D.C. Cir. 1983) (car towing without pre-deprivation hearing valid in light of assurance of prompt post-deprivation hearing).

The District appears to provide two ways to appeal a suspension by the Director. The first is District of Columbia Municipal Regulations § 12–112.13, but the subsection enti-

tling a permit holder to an "expedited hearing" is available only for a permit *revocation* under § 12–112.9.3. Alternatively, Tri County could have sought to have the Director himself review his illegal act under District of Columbia Municipal Regulations § 12–123.1.2, which requires that an official within the DCRA review actions against a permit holder within three days and that the Director review any decision by that official within another three days. Given that the reviewing official under both provisions would have been Cross himself, and that the rules appear to specify no minimum procedural entitlement for the aggrieved permit holder, these procedures do not advance the ball. Finally, however, Tri County could have appealed to the Board of Appeals and Review, which may provide a "hearing." See *id.* §§ 123.2, 123.3. Pending ultimate decision, the Board could have issued a stay of the Director's order, but there appears to be no assurance that any such stay would be issued promptly. See *id.* § 5–503.5–12. In short, then, there is provision for correction of the sort of suspension issued by Cross, but uncertainty as to its likely speed.

We evaluate these procedures under the tripartite test of *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

The property interest here—the entitlement to continue construction without unfair interference—is substantial; any interruption of construction is likely to be very costly. It might be claimed in favor of the District that the holder of a permit would not want to pour money into a project during the course of more thorough procedures, if revocation were at all likely. But that is a calculation that the permit-holder



would want to make for itself, balancing the costs of interruption against the costs of spending that may prove fruitless. While the harm is mitigated by assurance of higher-level review, the absence of time limits leaves the degree of mitigation in doubt.

The risk of erroneous deprivation is high. It is in principle reduced by the official character of Cross's informant (Malone was speaking of matters in his agency's jurisdiction) and by the presence of Tri County's representatives. Even so, the gaps were substantial. Cross's own department had conducted an elaborate review of the air quality impacts of Tri County's project. Assuming the full truth of Malone's statement about the housing project, Cross so far as appears pursued no procedure at all to assess whether the alleged change in circumstances materially undermined his agency's prior finding. Thus, although the "procedure" applied was not formally ex parte, it was a classic case of shooting from the hip on complex technical matters. It is a safe understatement to say that modest improvements in procedure—even rudimentary ones for testing the relationship between the new claims and the previously established facts—had a high probability of reducing the risk of error.

Finally, the government interest in swift action was negligible. Assuming the unbuilt housing project was ever to be built, or that the air pollution from Tri County might affect its residents materially, there was no gain whatever in halting construction a few days sooner than could have occurred if Cross had afforded Tri County an opportunity for testing his assumptions. Cross's "procedure" thus deprived Tri County of property without due process of law.

This conclusion is not affected by the uncertainties arising from Tri County's failure to contest either Cross's suspension or the stop work order. A violation of procedural due process may occur even if the damages are only nominal, see *Carey v. Piphus*, 435 U.S. at 266–67, and one pursuing a procedural due process claim need not exhaust his local remedies, see *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). In calculating any damages, however, both the possibility of relief from the District's Board of Appeals and Review, as

well as the possible mooting effect of the stop work order, may be pertinent.

Thus, finding Tri County's procedural due process rights violated by Cross's suspension of the building permit, we vacate the judgment and remand the case to the district court to consider the extent of Tri County's damages.

*So ordered.*



**[DE 67 – MEMORANDUM]:**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| TRI-COUNTY INDUSTRIES, INC. | : | |
| Plaintiff, | : | |
| v. | : | Civil Action No. |
| | : | 94-2014 (JR) |
| DISTRICT OF COLUMBIA, *et al.*, | : | **FILED** |
| Defendants. | : | JUL 25 1997 |

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

**MEMORANDUM**

Plaintiff seeks compensation for the District of Columbia's unlawful suspension of a building permit that had been previously issued to plaintiff for construction of a soil remediation facility. The theory of plaintiff's case, and the facts, are recited in the Court of Appeals opinion reversing my order granting summary judgment for the defendants and remanding the case for a determination of Tri-County's damages. Tri County Indus., Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).

At a status conference on March 14, 1997, the parties were directed to submit memoranda on the amount of damages plaintiff can establish, the legal justification for an award of damages, the effect of the District's defense of mitigation, and the amenability of the record to resolving the case without further evidentiary proceedings. The memoranda submitted by the parties betrayed diametrically opposite positions on the law.

1. Plaintiff takes the position that it is too late for defendant to contest the claim of $9.8 million in damages made in its original motion for partial summary judgment, because defendants failed to dispute the amount of damages or to submit any proof of its own. That position is rejected. Defendants were contesting liability, not the quantum of damages, at the summary judgment stage.

2. Plaintiff further asserts that defendant did not timely assert the defense of failure to mitigate and has filed a motion to strike. The motion will be denied. Strict limitation on the timing of pleading affirmative defenses is limited to the defenses of lack of jurisdiction, lack of venue, and failure to state a claim upon which relief may be granted. F.R.Civ.P. 8(c); F.R.Civ.P. 12. Other affirmative defenses may be raised by responsive pleading, such as an answer to an amended complaint, or by appropriate motion, including motion for summary judgment. See Charpentier v. Godsil, 937 F.2d 859, 863, n.4 (3rd Cir. 1991). In any event, liberal amendment of answers is allowed under F.R.Civ.P. 15(a). See Federal Election Commission v. Legi-Tech, Inc., 75 F.3d 704, 707 (D.C. Cir. 1996).

3. Plaintiff has also moved for summary judgment on the issue of failure to mitigate, arguing that the defense was waived (it was not, as discussed supra); that plaintiff has no obligation to initiate legal proceedings in order to mitigate, relying on Robinson v. Carney, 632 A.2d 106 (D.C. 1993); and that the District has failed to show that an appeal of the building permit suspension would have been decided in a reasonable time. That motion will be denied. The rule on failure to mitigate damages is that plaintiff may not recover damages for losses that could have been reasonably averted after the suspension of its building permit. Tatum v. Morton, 562 F.2d 1279, 1282-84 (D.C. Cir. 1977); Minkoff v. Clark



Transfer, Inc., 841 F. Supp. 424, 430 (D.D.C. 1993). Robinson , which held that a party's failure to protect his or her interest by filing a lawsuit does not constitute contributory negligence and therefore is not a complete bar to recovery, is completely inapposite. And plaintiff will not be heard to argue that defendants failed to show that an appeal from the suspension would have been resolved in a reasonable time. Tri-County took no appeal at all, not did it take any step to challenge the stop work order that was issued two days after the building permit was orally suspended. See Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1475 (5th Cir. 1991) (plaintiff's damages limited by the failure even to request exception to environmental regulation, even if exception would not have been granted).

4. The question of whether the stop work order issued two days after the suspension order moots plaintiff's due process claim (and bars recovery for all but nominal damages) was suggested by the Court of Appeals but has been given only passing attention in the parties' briefs. The issue is not presented for decision at this time, however.

5. The affidavit of plaintiff's environmental expert, attesting that it is "probable" that from 1994-2000 Tri County would have treated 75,000 tons of soil per year at $40/ton, is insufficient to establish loss of profits with reasonable certainty. See Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Samaritan Inns, Inc. v. District of Columbia, 114 F.3d 1227, 1234 (D.C. Cir. 1997). As the record now stands, any estimate of lost profits related to Tri County's soil remediation business, a relatively new enterprise with no proven record of profits, would be based on speculation. Country Club Assocs. Ltd. Partnership v. FDIC, 918 F. Supp. 429 (D.D.C. 1996).[1]

An order will issue denying plaintiff's motion to strike and plaintiff's motion for summary judgment. No other motions are pending. The defense theories of failure to mitigate and mootness require a more developed record and perhaps an evidentiary hearing. A status conference will be set for the purpose of discussing how and when the necessary record development is to occur.

An appropriate order accompanies this memorandum.

*/s/ James Robertson*
JAMES ROBERTSON
United States District Judge

Dated: *7/24/97*

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Contrary to plaintiff's assertion, defendant's challenge to plaintiff's proof of lost profits is not an affirmative defense.



TRIAL TRANSCRIPTS & EXHIBITS -- CIV. NO. 94-CV-2014 (D.D.C.)

**Testimony of Karleen Donnells, Vice President of Tri County Industries.**

[DE 111, p. 78 -- Direct Examination]:

Q. Ms. Donnells, does Tri County remove for treatment large quantities of soil that has petroleum in it?
A. Yes, we do.
Q. Have you been able to determine on an annual basis the amount of such soil that Tri County will handle?
A. On average, it's been well over 60,000 tons per year.

[DE 111, pp. 95-96 -- Direct Examination]:

Q. What is Plaintiff's Exhibit 34? * * *
A. These are the T.A. Bennett Trucking Company [invoices] for hauling of soil into the Bryant Street facility.
Q. Do you know why soil was being brought into Bryant Street?
A. We needed to perform a stack test with the new machine for the air quality permit.
Q. And what is Plaintiff's Exhibit 35? * * *
THE WITNESS: A summary of all the payments to T.A. Bennett with the cancelled checks. * * *
Q. What is Plaintiff's Exhibit 36? * * *

THE WITNESS: These are invoices from TSC Transport. They also hauled soil to Bryant Street. * * *

Q. And Plaintiff's Exhibit 37? * * *

THE WITNESS: Summary of the payments to TSC Transport and the cancelled checks.

[DE 111, pp. 100-01 -- Direct Examination]:

Q. You have fringe benefits, 28 percent at the top here. What are fringe benefits that you pay for your employees?

A. Those are be [sic] the unemployment, the federal and state unemployment taxes, Medicare, health and welfare benefits, holiday and vacation pay.

Q. And is that generally 28 percent of their paycheck?

A. That's correct.

Q. And what about corporate overhead? What does that generally include?

A. Corporate overhead is basically everything that is not a direct cost to a job.

Q. And is that at least 25 percent?

A. At least.

Q. And look at Plaintiff's Exhibit 44. * * *

THE WITNESS: It's a summary of all the expenditures we just verified. * * *

Q. For Bryant Street project?

A. Yes. * * *

Q. This does not include the lost profit claim; is that correct?

A. That is correct. These are all strictly direct costs.



[DE 111, pp. 102-04 -- Cross Examination]:

Q. Ms. Donnells, I direct your attention to Plaintiff's Exhibit 34. * * * And what is that exhibit?

A. This is the T.A. Bennett trucking invoice for hauling soil to Bryant Street.

Q. Okay. And it is for hauling soil for what period of time?

A. From -- well, from July of '93 to October of '93. * * *

Q. Okay. Let's start with the first invoice. What date was that for?

A. July 30, 1993. * * *

Q. That was contaminated soil on that day?

A. Yes.

Q. Okay. And the next invoice?

A. August 13, '93. * * *

Q. What is the next invoice? What is the date of that?

A. August 27, '93.

Q. Okay. What was done on that day?

A. Hauling soil. From Hilton Hotel and Fairfax schools.

Q. Okay. How much soil was hauled on that day?

A. Eighteen loads on this invoice.

Q. In layman's language, what does 18 loads mean?

A. You can average maybe, say, 20 tons per load. Depends on where it comes from.

Q. 20 tons per truck?

A. Uh-huh.

Q. Okay. And on September 13? You were billed for transporting soil from where to where?

A. From NIH * * * Bethesda. * * *
Q. Bethesda. And how much soil was transported on that day?
A. 13 loads.
Q. Okay. What is the date of your next invoice?
A. September 17. * * *
Q. How much?
A. Ten loads.
Q. Ten 20-ton truckloads? Okay. What does your next invoice say, ma'am?
A. September 24th. * * *
Q. And how much soil was transported on that day?
A. Ten loads.
Q. Ten loads? And do you have additional invoices?
A. I have one for October 8.
Q. Okay. And how much soil was transported on that day?
A. Eighteen loads.
Q. Okay. And do you have any other invoices for T.A. Bennett?
A. February and March of '94 invoices for hauling soil away from Bryant Street.

**Testimony of John Wegznek, certified public accountant**

[DE 113, pp. 113-14 -- Direct Examination]:

Q. Now, in this case, there was a soil cleaning -- piece of soil-cleaning equipment that Tri County intended to purchase which cost $600,000. * * * Did Tri County and its principals have sufficient cash resources to purchase this equipment? * * *



THE WITNESS: Yes, they did. * * *
Q. And what would have been the personal property taxes on this equipment if it had been purchased? * * *
A. * * * With a projected cost of $600,000 the first year's personal property taxes would be * * * $17,850, I believe.
Q. Now the lease that's been introduced into evidence for the -- for where the facility was to operate on Bryant Street indicated that Tri County had an option to purchase that property from the landlord for $1,400,000. Are you familiar with that provision in the lease?
A. Yes, I am.
Q. Did Tri County and its principals in 1993 have sufficient cash resources to purchase that property?
A. Yes, they did. * * *

**Testimony of Glenn Selzer, President of Tri County Industries**

[DE 113, pp. 117-19 -- Direct Examination]:

Q. Tell me what your company does.
A. The company does environmental services. The majority of our work right now is centered around the underground storage tank regulations the EPA passed. We do a lot of underground storage tank replacements * * *.
Q. When you dig up an underground storage tank that has leaked, what are you required to do with the soil?
A. The soils that -- around the tank in many cases, the tanks have corroded. Oil has leaked into

the soil. The petroleum product, the gasoline, or in most cases diesel fuel or heating oil has mixed with the soil, and the whole goal of the EPA regs is to protect the ground water. * * *

Q. And what do you have to do with this soil?

A. Well, we remove the soil that has been impacted by the oil until we get to clean soil that hasn't -- hasn't mixed with any oil. Then we take it to a treatment facility to be treated.

[DE 113, pp. 120-21, 123 -- Direct Examination]:

Q. When did -- before Tri County actually started this project on Bryant Street, did you have any experience in soil cleaning?

A. Yes. We would have had the problem since we got into this business. The problem we have, though, is all the facilities that handle it. Washington is a paper town; there is no real industry here. So cities that have industry obviously have more oil-impacted soil. They have services there. We ended up having to haul -- to this date, there is no place in the city to take the stuff. We have to haul it to other cities, Baltimore, Richmond, things like that.

Q. In 1991, did you start a soil cleaning business?

A. Yes. * * * On New York Avenue, 1911 New York Avenue. * * *

Q. How long were you working at New York Avenue?

A. We were there for probably several months. * * *

Q. Was the equipment that was used there tested by the District or in the presence of District of Columbia officials?



A. Yes, it was.

Q. And was a report issued regarding that?

A. Yes, it was. We hired a company at the city's requirement to come and do what is called a stack test. That measures volatile organics being emitted from the stack, if there are any, and also measures dust and particulate. * * *

Q. Did those tests pass the District of Columbia's requirements?

A. Yes, they did.

[DE 113, p. 125 -- Direct Examination]:

Q. * * * [W]hat happened with the facility on New York Avenue? Why did that not continue?

A. The site at 1911 New York Avenue was not zoned for the industrial use that we -- that -- this plant was considered to be an industrial machine. They come and said that the zoning there didn't fit the use of this machine. We had to find an industrial site.

Q. Did you start looking for an industrial site?

A. We did.

Q. And did you find one?

A. Yes. Sometime later we located a site at 2115 Bryant Street.

[DE 113, pp.127-33 -- Direct Examination]:

Q. What equipment were you going to buy for this project?

A. The -- the same we used on New York Avenue from Dustco, the Gencor thermal absorption unit. * * *

Q. What was the price of that?

A. $600,000. * * *
Q. How many employees would you need to operate this plant?
A. Five people.
Q. And what would their duties be?
A. A supervisor plant operator, an assistant that would help him run things, a loader operator that would run a loader, heavy piece of equipment to load the dirt into the machine, then a couple of laborers to go around and sweep up and keep things moving and just general labor work.
Q. How much would the salaries cost you for these employees?
A. About $50,000 a year for the supervisor; the assistant would probably be $30,000. Machine operator would make about $30,000 a year, the guy that runs the loader. The laborers, that's $7 an hour.
Q. How long would the plant be in operation?
A. We'd run six days a week, a shift and a half, run 12 hours a day. * * *
Q. In 1994, what was the cost on hauling?
A. It would run a dollar a ton. I base that on the dump truck rentals, about $40 an hour. They could go most places in the city in about half an hour.
Q. And then would you have to do lab tests as part of the operational costs of this?
A. Yes, we would.
Q. Why?
A. We'd do it in the initial -- like I mentioned before, just to assure what we was bringing over was just oil, oil that had leaked out of the



tanks in the soil. No hazardous wastes were there.

We would also do checks at the plant every day to make sure the soil that was in there was actually what the plant was -- we had identified originally, brought in there.

Q. Did your permit allow you to treat any hazardous wastes at this facility?
A. No, it didn't. * * *
Q. Did -- how much would lab tests have cost?
A. About $35 each. * * *
Q. How often, how many tests do you feel that you would have been doing per day?
A. Probably four.
Q. Does your company own a loader that it could have used to put the dirt with petroleum into this machine?
A. Yes, we do.
Q. And what about a mechanic to do repair work?
A. We also have mechanics.
Q. On staff full time?
A. Yes.
Q. Tell me what you do with the dirt when it comes out of the machine with the petroleum removed.
A. Once the clean dirt comes out of the machine, we're * * * constantly digging up other sites in the city where there's tanks. We take the clean dirt and use it to fill in those holes. Currently we have to buy dirt, backfill material to backfill those holes with.
Q. * * * [I]n 1994 how much were you paying for clean fill dirt?
A. I'd say a minimum of $2 a ton.

Q. Have you estimated how much clean dirt you would be able to resell coming out of this cleaner?
A. 40-, 45,000 tons.
Q. Have you -- you're aware of the production rate of this piece of equipment; is that correct?
A. Yes.
Q. How many tons of soil could you have cleaned in a year with this machine?
A. About 75,000 tons.
Q. And did Tri County have the ability to keep this machine going full time with its own business?
A. Yes.
Q. * * * [I]s there a certain amount of material that the machine does not clean?
A. Yes. When you dig these sites up, you always have the pavement that is over the top, concre , some under sidewalks, curbs. You get about 10 percent of the material that comes in is not soil * * *.
Q. That would still be charged to the customer?
A. The trucks are weighed by the ton. They pay for all the tonnage on the truck.
Q. What were your financial projections when you started this project in terms of profit?
A. Probably $2 million a year.
Q. And your permit was suspended by Mr. Cross, the director of DCRA, in September, the 20th, of 1993. Do you recall that date?
A. Yes, I do. Very well.
Q. How much longer before your plant would have been operational?
A. 30 to 60 days.
Q. What remained to be done?



A. The gas line was pretty well down the street. It was just about completed. We were moving the equipment from the Midwest. * * *
Q. What type of tests did you have to undergo for the District before you could start receiving soil?
A. As part of the permit to construct the plant, the environmental control division of DCRA, the air quality section, Mr. Wamsgans' office asked us to perform an additional stack test like we performed on New York Avenue.
Q. What do you mean by a stack test?
A. That is a test where we run the plant and run soil through the plant, they hook up air-monitoring equipment all up and down the stack that comes off the afterburner and measure for any contaminants or hydrocarbons, those carbons that wouldn't get remediated in the plant, and also measures for dust, the amount of particulate you put into the air.
Q. This was the same test, though, that had been performed a year or two before on New York Avenue on the equipment?
A. He just wanted to make sure the machine was operating as efficiently as there. * * *

[DE 113, pp. 135-39 -- Direct Examination]:

Q. Before this suspension on September 20, when he [, Hampton Cross,] suspended your plant from operation, had you received a ticket from D.C.?
A. We did. * * *
Q. And what was that ticket for?
A. Operating without an occupancy permit * * *.

Q. Did you have a certificate of occupancy at that point?
A. No, we didn't.
Q. Why not?
A. In order to get the certificate of occupancy, we had to complete the requirements under the permit to construct.
Q. When you were bringing the soil in, were you operating at that point?
A. No. That was * * * we brought the soil in to burn for the stack test, which was part of the permit to construct. We had to construct and test it before they would give us an occupancy permit.
Q. Did you pay the ticket?
A. No, we didn't.
Q. How much was the ticket?
A. $500. * * *
Q. On September 22, after Mr. Cross had suspended your permit to do work on this project, was the stop work order posted on your building?
A. Yes, it was. * * *
Q. At that point, why didn't you pay the ticket and have the stop work order removed?
A. Well, the -- if that was the only problem, it would have been very simple. Just pay the $500, whether we were wrong or right, and go back to work. That wasn't the real problem.

The real problem was Mr. Cross suspended our construction permit, and we had no way of knowing whether we were ever going to be -- you know, be able to continue with the project, or if it was going to remain suspended.



Q. Did you have the ability at any time to take that dirt out of the facility or get a provisional certificate of occupancy?
A. Yes, we did.
Q. Why didn't you do those?
A. We thought the -- like I say, we were solving the problem with Mr. Cross, that was the big problem. We -- in other words, if we couldn't solve that problem, the other stuff didn't make any difference. We could have paid the thing and still hadn't done anything with the permit suspended. * * *
Q. Why didn't you appeal this decision?
A. Well, in consulting with Mr. Farmer [, Tri County's counsel], he said the appeal * * * would take at least a year and that * * * the appeal board was politically motivated, you know, if there was public pressure, * * * that it * * * wouldn't matter whether it was legal or whether our facility was what we said it was or anything else.

So basically we lose a year, and the -- at that point, the project would fall apart. I mean, the machine we had for * * * $600,000 would probably be sold to someone else by then. We'd have to find a new one.
Q. Did you know where you could find a new one?
A. No. We -- we knew manufacturers that made them, but we hadn't -- we didn't investigate that at that point because of -- you know, the Dustco machine was a used machine, so it was probably less than half, or around half the cost of a new one.

Q. If you had appealed, would you have had to purchase the equipment?
A. Yes, we would have.
Q. Why?
A. Like I said, Mr. Johnson at Dustco had other people interested in it. * * *

Anyway, he had other sales for the machine. He wouldn't have sat around and waited a year for us. He would have sold it to somebody else.

Q. What about the rent during the period of time? Would you have had to continue paying rent during an appeal time?
A. Yes. And the rent was substantial. Like I say, it was $14,000 a month basically for this warehouse and this property. * * *
A. It would have cost us a -- close to a million dollars to appeal it in -- at the end of the appeal, * * * if there was political motivation, we would have lost that appeal and had to go to the next step. Who knows how much more it would have cost us?
Q. What decision did you make then?
A. At that point, we decided that we couldn't go forward with that appeal. To -- in November, we gave the property back to the owner.

[DE 113, pp. 145-46 -- Cross Examination]

Q. * * * And what is Plaintiff's Exhibit 34, sir?
A. This is bills from a trucking company, T.A. Bennett Trucking Company, that did hauling for us.
Q. Does that represent billings for soil trucked to 2115 Bryant Street?



A. Yes, it does.
Q. What are the dates of those billings, sir?
A. The first one is on July 30.
Q. What period, sir?
A. 1993. I'm sorry. August 13, 1993, August 27 of 1993, 9/10/93, 9/17/93, 9/24/93, and 10/8/93.
Q. Okay. During that period, sir, did you have a permit to operate the facility?
A. At Bryant Street?
Q. Yes, sir.
A. No, we didn't.
Q. And weren't you cited as a result thereof for storage of soil without a permit, certificate of occupancy?
A. We were cited for operating without an occupancy permit.

[DE 113, pp. 166-68 -- Cross Examination]

Q. And did you receive that letter, sir?
A. Yes, I did.
Q. Okay. And who wrote that letter?
A. Ferial Bishop.
Q. When is it dated?
A. 15 October 1993. * * *
Q. And are there a series of questions that she asks?
A. Yes, there is.
Q. Okay. And at number 2, does it indicate that she wanted to know the amount of soil you processed per day at the facility?
A. Yes, it does.

Q. And number 3, did she want to know the number of trucks in and out of the facility each day?
A. Yes.
Q. Number 4, did she want to know the proposed routes of the trucks * * * through the neighborhood?
A. Uh-huh. * * *
Q. Contingency plans for any odors, if any?
A. Yes. * * *
Q. Mr. Selzer, did you respond to the letter?
A. With a phone call. * * *
Q. Mr. Selzer, you're not answering my question, sir. I asked if you responded to this letter from Ferial Bishop.
A. Prior to her sending it. * * *
Q. Okay. My question is, did you answer the letter?
A. This letter?
Q. Yes.
A. No. * * *
Q. And you ignored the letter?
A. No. I sent it before they sent the letter -- during the permit application. They had all this information. We went through vector control for the rodents, through site plans, an engineer's site plans, surveys of the property, sizes, all this -- exact questions were part of the permit application. They had all this information months before they sent the letter.



[DE 113, pp. 181-82 -- Redirect Examination]:

Q. Did the District of Columbia have a review process that you had to undergo to get this permit?
A. Quite extensive. We spent almost a year, a good nine months, meeting with different DCRA agencies and the city officials, even Council Member Thomas' office, and made a presentation as to what was -- what the project would do and how it worked and all the technical review and measurements and property lines, site drawings. Just an extensive, tremendous amount of work.
Q. Before the District issued you this building permit, had you supplied them with all of the information regarding your project that they requested?
A. Yes, we did.
Q. When you received the October 15, 1993 letter requesting more information, was any of those requests seeking information that you had not given to the District already?
A. No. * * *
Q. Did the District of Columbia have any right to request additional information from you after your permit had been issued?
A. Our counsel advised us, no, that we had already complied with all the letters of the law in obtaining the permit.

[DE 113, pp. 183-84 -- Court Examination]:

THE COURT: For stack testing, you needed 75 tons of dirt?

THE WITNESS: Yeah. Actually, what happens when you first set the plant up to perform the stack test, it's when you first start processing soil and they burn it, the bag house, the stuff that takes the particulate out, not the part that takes the oil out, but the part that controls the dust from the dry dirt is almost similar to a swimming pool filter where it coats the filter before it starts operation.

You have to coat the bag house with dust to burn soil for probably about an eight-hour period to get everything coated and set up.

THE COURT: You have to run it for eight hours before you can do it for three hours?

THE WITNESS: Before your can start running soil for a test, yes.

THE COURT: So at 11 hours -- so that's three hours of testing and eight hours of prep. That's 11 hours.

THE WITNESS: Probably so.

THE COURT: At 25 tons an hour?

THE WITNESS: Yes.

THE COURT: That's 275 tons?

THE WITNESS: Sounds pretty accurate.

THE COURT: About 15 dump trucks full? 14? 20 tons a truck?

THE WITNESS: Yes. Probably about 15 truckloads,' something like that.



**Testimony of Jonathan L. Farmer, counsel for Tri County Industries**

[DE 113, pp. 191-93 -- Direct Examination]:

Q. When Tri County's building permit was suspended on September 20, 1993, do you recall that incident?

A. Yes, I do. * * *

Q. Would you tell the ladies and gentlemen of the jury what you did?

A. I called Mr. Cross to ask him the circumstances by which the permit had been suspended and exact reasons why. Mr. Cross indicated to me that he had attended an Advisory Neighborhood Commission meeting, that it had been a very raucous and somewhat unpleasant meeting. I think what he exactly said to me was the nastiest meeting he ever had attended.

There were questions about the permit and its effect on the immediate neighborhood, certain politicians were asking questions as well about the permit, and that he was going to suspend it for further investigation.

Q. Did you request that he lift the suspension?

A. Within that same conversation?

Q. Or anytime after that conversation?

A. Yes.

Q. And what was Mr. Cross' position?

A. Mr. Cross' position was that it could not be lifted. One, he had been directed that it was not to be lifted. Two, they had discovered that there were residences within a certain distance of the building.

Q. Who -- did Mr. Cross indicate who told him that it could not be lifted?
A. I believe the city administrator at that time.
Q. Did you tell that to the client, Tri County Industries?
A. Yes.
Q. Did -- what did you advise Tri County Industries at that point they should do?
A. Basically, as I said, they had -- I think they said they had a right to an appeal, but I indicated to them that that appeal would take some time.
Q. Do you recall where that appeal would have been directed to?
A. Board of Appeals and Review.
Q. And is that the only appeal remedy that they would have had in this situation?
A. Depending on the nature of the suspension, no; it could have also gone to the Board of Zoning Adjustment.
Q. How long did you tell them it would take to appeal to the Board of Appeals and Review?
A. Eight months to a year.
Q. Did you make any recommendations to them?
A. I believe I said that was really a business decision or their choice at that particular juncture, asking for direction.
Q. * * * [C]ould Tri County have filed a lawsuit to set aside this suspension in a court rather than an administrative appeal?
A. I don't think you could have gotten to court without exhausting the administrative remedy.
Q. What do you mean by exhausting administrative remedies? Explain that to the jury.



A. You have to appeal to the agency directly. You have to give the agency an opportunity to address this situation before going to court.
Q. What happens if you file a lawsuit without following through on your administrative appeals before?
A. I assume it is dismissed.

**Testimony of Alfred Dishian, business consultant**

[DE 113, pp. 198-204 -- Direct Examination]:

Q. What experience do you have with soil-cleaning equipment, Mr. Dishian?
A. Well, I worked for Gencor Engineers. * * *
Q. What was their product line?
A. Their product line was low-temperature soil remediation equipment and plants.
Q. And what was your position with that company?
A. Business development manager. * * *
Q. Did Gencor sell a model 232?
A. Yes, they did.
Q. And what was the name or the number of that model changed at any time? * * *
A. * * * I introduced a new numbering system, a 625/825, which meant temperature of operation, size of plant was a different nomenclature, but essentially the 625 plant was the same as the 232 plant. * * *
Q. Why don't you explain to the jury how this type of equipment operates. * * *
A. * * * So the soil comes in, very much -- and is tumbled around like in your drier at home. * * * The flame and hot gases pass through the

soil, heat it up, and drive off the petroleum oil that's in the soil and the moisture that's with it.

The hot gases are pulled from this rotary drum into a bag house, very much like a vacuum cleaner. * * *

Now the dust falls to the bottom here, and there's a screw which carries it out to another mixer here, and water is put in it. The soil -- the hot soil comes from here and goes up to the bag house.

Now the reason for this is that the hot soil that comes out of here is clean, but the dust that comes out of this end that goes to the bag house may not be as clean. So what they do is they take * * * the hot soil, and this is around 600 or 700 degrees, very hot, and they put it in the bottom of the bag house, and there's a screw which pulls it all through the bag house.

Now * * * there's a compressor that pushes on the bags, and it drops the dust down on the hot soil, going through here. And that mixing dries off what little petroleum is left in the dust and is sent out to a furnace. Just like a regular furnace might burn all these gases.

The hot soil then is mixed with -- with the dust and water is put in it, and then it becomes a clean pile of dirt.

Now, the gases here go to that furnace over here, where there's another burner. The gas is put in and is raised to approximately 1600 degrees Fahrenheit, which guarantees for the length of time that this is sized for that the gases coming out of here will be 99 percent free of petroleum. That's the way the machine is designed. * * *



Q. I'd like to show you what's been marked as Exhibit 47. * * *

Q. What is the second page?

A. Process specifications and performance.

Q. Are those the specifications that were in effect in 1993 for the Gencor 232 or 625 units?

A. Yes. Yes.

Q. And are those specifications accurate in terms of the capability of the equipment?

A. Yes. * * *

Q. What is the amount of soil that this piece of equipment can treat?

A. Well, it has a nominal capacity of 25 tons an hour. It varies depending upon the amount of moisture that's in the soil. * * *

Q. How high can the capacity -- or the treatment rate go?

A. Well, at 6 and 8 percent moisture, you can get almost 40 tons an hour out of the machine. * * *

Q. * * * [C]an you tell us how many employees it normally takes to operate this equipment?

A. * * * I would say there's three people at a minimum.

Q. If you had a qualified mechanic, what would be the repair parts and costs for that on an annual basis for this type of machine?

A. Well, the parts, I would say if you -- usually you run through the bags. Like I said, there are 232 bags in the bag house. And you usually run through one of those sets of bags in a year's time. They cost $12,000 to $14,000. Other incidentals that -- belts for the pulleys and bearings and so forth, electrical components, I would raise that up to $18,000 to

$20,000 a year in parts alone * * * for a single shift operation. If you operate the machine two shifts, then, you know, you're going to get more wear.

[DE 113, p. 214 -- Cross-Examination]:

Q. Would you agree that there is some -- there are some health risks associated with the handling and processing of contaminated soil involving gasoline products? * * *
A. No more than filling up your car with gasoline.

**Testimony of Donald G. Carter, consulting engineer**

[DE 113, pp. 223-27, 230 -- Direct Examination]:

MR. EMIG: Your honor, at this point, I would move the Court to recognize Mr. Cross [sic] as an expert in the field of mechanical engineering, energy, and the cost of energy estimating.

MR. BOLDEN: I have no objection.

THE COURT: All right.

BY MR. EMIG:

Q. * * * [D]o you have an opinion as to the annual utility costs that Tri County would have incurred if it had operated a soil-cleaning facility at 2115 Bryant Street?
A. I do.
Q. And what is that opinion?
A. It was expressed on my spreadsheet, without memory of the numbers, it is my opinion of the electrical, the water, and the gas costs that



would apply to the equipment that was going to be applied at that project.
Q. Will you look at Plaintiff's Exhibit 52. * * *
Q. Is that, in fact, your sheet?
A. Yes, sir. This is the sheet.
Q. Okay. Now when you prepared that, what did you rely upon?
A. Manufacturers' data for the equipment in question. * * *
Q. Okay. What else did you rely upon?
A. * * * So I relied on the information given me by the man with Washington Gas who does that or did that, and he provided me with the exact information I needed. * * *
Q. Look at Exhibit 51, please. * * *
Q. What is that?
A. These are the gas rates for commercial, primary, and high voltage service, or for secondary service. In this case, that sheet is the secondary service as one would pay.
Q. You said gas rates.
A. I mean electricity. * * *
A. * * * The system could do 20 tons of soil per hour. * * *

305 days in a particular year would have no holidays and no Sundays, but it would be those same six working days without holidays or Sundays that were at stake. There would be 12 hours of work per day. We would add to that a half an hour of warmup time at 10 percent of the fuel consumed to bring the equipment up to temperature before it began working.

**Testimony of Vincent DiRenzo, environmental consultant**

[DE 113, pp. 238-39, 240-44 -- Direct Examination]:

Q. Which treatment facilities in this area do you normally deal with?
A. Presently there's really only two that are remaining. TPS out of Baltimore, and also Bardon, which operates a facility in West Virginia.
Q. Do they have any in Virginia?
A. No. I don't think there's any thermal treatment units in Virginia anymore. * * *

MR. EMIG: I offer Mr. DiRenzo as an expert in the field of remediation of soil with petroleum content.

THE COURT: Any objection to that?

MR. BOLDEN: No objection

THE COURT: All right. * * *

Q. Did you at my request do an analysis of the costs in the Washington metropolitan area to thermally treat soil with petroleum in it during the period 1994 to the year 2000?
A. Yes, I did.
Q. Did you prepare a report that reflects what those costs were?
A. Yes, I did.
Q. Look at Exhibit 54, please. * * *

BY MR EMIG:

Q. When did you prepare that report?
A. The document is dated March 24, 1995. That seems the timeframe is correct. * * *
Q. Did you have an opinion as to whether in 1994 there was a need in the Washington area for a thermal treatment facility to clean petroleum soil? * * *



A. That there was a definite need.
Q. Why do you say that?
A. We had numerous projects going on at that time. In addition to the market itself, any -- or most of the construction projects within the D.C. metro area generally require excavation of the materials within the area that they are building, 'cause they're putting parking garages or that's part of the design.

Because of that, in the Metro additions, a lot of the construction projects were generating a large volume of contaminated materials at that time. * * *

Q. And did you since that report, since there was some time between when that was prepared and when we came to trial, did you have occasion to update your report?
A. Yes, I did.
Q. And tell us what you did for that.
A. Basically what we did was we went back and resurveyed because there had been -- since we had done the initial survey, there had elapsed quite a bit of time, and there had been a lot of change in the marketplace. So what we did was reevaluated, spoke to the disposal facilities that exist now, which are much less, and then just basically redid and justified the pricing again.
Q. And do you have a copy of that report?
A. Yes, I do.
Q. Is that attached at the end of Plaintiff's Exhibit 54?
A. Yes. That's my letter dated March 30, 1998.

Q. And tell the jury what your opinion is in terms of what the market rate would have been for thermal treatment of soil with petroleum in it during the period 1994 to the year 2000.

A. Sure. Basically, for all of 1994, again, we were looking at $40 a ton; in 1995, we were seeing a decrease, basically about $2 a ton to $38 a ton. Then in 1996, basically we differentiated part -- two halves of the year because there was quite some change. It dropped again by $2 to $36 a ton. By the end of 1996, it was down to about $34 a ton, averaging for the year about $35 a ton for the year 1996.

Then our projection from 1997 through 2000, some of which we had information on '97 and also in discussing with -- updating the thermal treatment facilities in that market -- that are within the D.C. market, we came up with $32 a ton.

Q. Do you know if these rates included transportation to the facilities?

A. They did.

Q. Do you have an opinion, Mr. DiRenzo, that if Tri County Industries had opened a soil treatment or soil-cleaning facility in 1994 if there would have been sufficient petroleum soil so that it could have treated 75,000 tons per year from 1994 to the year 2000?

A. I feel very confident it could have.

Q. Why do you say that?

A. Just because of the amount of projects. Again, to the construction, the whole Metro line that went through, as well as all of the additional construction projects -- and most of these are just federal based -- involving large amounts of



contaminated soil being so close within the District of Columbia made it just very advantageous. It would have for us, and we did dispose of contaminated soil at that time.

MR. EMIG: Your Honor, I move for the admission of Plaintiff's 54.

MR. BOLDEN: Your Honor, I would object to the report.

THE COURT: I don't think we need Exhibit 54 because * * * you have his opinion on the * * * dollar cost per ton per year. You have his opinion that there is enough soil to satisfy 75,000 tons per year. I think those are the basic opinions you need. The report is unnecessary, and I'll sustain the objection.

[DE 113, p. 253 -- The Court]:

THE COURT: You said there is no remediation facility or soil-burning facility in Virginia?

THE WITNESS: Well, there wasn't. A lot of it was landfilling or other types, bio-remediation, but the actual thermal treatment process, there was not.

THE COURT: Never was?

THE WITNESS: There was one with Enviro-Care for a short period of time.

THE COURT: What happened to it?

THE WITNESS: They eventually lost their permit, and I think it was never -- once it expired, I don't think it was allowed to be reactivated.

THE COURT: What was the facility referred to in your report that attempted to gain

a larger portion of the market by reducing gate prices below cost and had to be sold at a loss as it could no longer make payment on an incurred debt?

THE WITNESS: That was a facility in Baltimore. Again, they came into the market when there was a lot of construction activities and tried to really lower the price of their -- I guess to try to get into the market. Basically within a year, they were out of business.

**Deposition Testimony of Larry Johnson**

[DE 113, pp. 7-16]

Q. And how long have you owned these Gencor 232s?
A. Since 1990.
Q. Are you familiar with the operation of these pieces of equipment?
A. Yeah. * * *
Q. Do you supervise the operation of these pieces of equipment?
A. Yes.
Q. Are [sic] they produce any excessive noise or odor or smoke when they are operated?
A. No. * * *
Q. And what about dust or smoke?
A. There is no dust and there is no smoke. The only thing we have is steam comes off the hot soil on the discharge end. * * *
Q. And is there any odor produced by this process?
A. No. * * *



Q. Okay. Are you familiar with the soil treating capacity of this particular Gencor 232 unit?
A. Yes.
Q. How many tons of contaminated soil will it treat per hour?
A. 25-40.
Q. How many people does it take to operate this particular model?
A. A minimum of three per shift. * * *
Q. What percent, based on your experience, of soil that it brought into your facility does not have to be treated because of its larger size?
A. 10 to 25 percent.

**Testimony of Joel M. Morse, professor of financial economics**

[DE 113, pp. 259-66 -- Direct Examination]:

Q. Do you teach valuation of new businesses to your students?
A. Yes. Essentially, a new business is part of the curriculum in corporate finance as well as in investment analysis.

A new business is really a prospective or forthcoming set of cash flows. As such, I routinely teach that to people who are out there doing that stuff, and I have done it as a consultant; and I both teach and learn from my students who are practitioners of this art. * * *
Q. Have you testified or prepared opinions on the issue of lost profits of new businesses before?
A. Yes, I have.
Q. And can you indicate when that would have taken place?

A. Well, I've done that from time to time on and off in court since 1988. I would say it happens at least once a year, probably more often. * * *

Q. Is there anything that makes valuation of new businesses too speculative for you to reach a valuation figure?

A. To value a new business is an established part of discipline I teach in the graduate program at the University of Baltimore. We wouldn't teach it if it were speculative. We believe it's a natural part of business decision-making which is to go into new ideas, new ventures and new areas.

MR. EMIG: Your Honor, I offer Dr. Morse as an expert in the field of financial economics.

MR. BOLDEN: No objection. * * *

THE COURT: No objection? All right. Dr. Morse may give opinion testimony in this field.

BY MR. EMIG:

Q. Did you at my request do an analysis and prepare a report regarding the lost profits that Tri County Industries sustained when its building permit was suspended by the District of Columbia?

A. Yes.

Q. And for what period of time did your report include?

A. The year began in 1994 and continued through the year 2000, so some of those lost profits are past and some are future. * * *

A. Yes. [Exhibit] 56 is my report in this matter dated April 1995.



Q. And did you arrive at an opinion in terms of how much Tri County Industries lost in terms of profits during the period 1994 through the year 2000? * * *

A. That amount was $11,628,174. * * *

Q. The information that you received regarding the costs and the profit -- or the costs and the revenues for this project, was that the type of information an expert in your field reasonably relies on?

A. Yes. * * *

Q. Let me ask you one question. The revenue figure on which you base your figures, were they provided by Mr. DiRenzo of Apex Environmental?

A. Yes.

[DE 113, pp. 272-73 -- Direct Examination]:

A. * * * So I'm working here in a model of revenues minus costs, which I feel is a traditional model and a traditional way of looking at the prospective or possible profitability of a new venture. So, for example, in the year 1994, I estimated that revenues would have been $3,367,500. From that, I took away the cost of doing business. * * *

I subtracted the cost line from the revenue line. So, for example, this number here, $2,031,592, is really easy to get at. All I did was take $3,367,500 and take away from it or subtract $1,335,908; and I got as a result, or as an answer, $2,031,592.

[DE 113, pp. 276-77, 279-81 -- Cross-Examination]:

Q. As I understand your testimony, Dr. Morse * * * you don't have expertise in the soil remediation field; and in putting together your numbers, you relied upon reports and numbers put together by other persons in the field; is that correct?

A. Yes.

Q. And your opinions then piggyback on the opinions of other experts retained by Tri County in this litigation?

A. Yes. * * *

Q. * * * Did you independently look at the profitability of the companies that had been surveyed in Apex's report?

A. No. * * *

Q. Then is it true that you made no assessment as to whether the companies that are indicated in this report prepared by Apex were start-up companies?

A. That's correct. * * *

Q. * * * Wouldn't it seem reasonable that you would compare your profitability statement based upon a company similarly situated to Tri County, one that was new to the field, one that had no prior experience or training in the field, and one that, for all intents and purposes, was nonexistent?

A. Well, that last sentence throws me for a loop. If it's -- I cannot compare anything with a company that you said was nonexistent.

Q. Hold on a minute. You can compare it, then, to a new company in the field?



A. What I have done is common to my field, which is to estimate the costs and the revenues for a new venture using data that's knowledge -- data and knowledge in that industry. And I relied on -- and I was asked to rely on -- the report we are now discussing from Apex.

I was not asked to do the ideas that you are now suggesting, and I did not independently believe that to do so would be either possible or appropriate.

[DE 113, pp. 284-85 -- Redirect Examination]:

Q. Dr. Morse, do you have any indication that any of the information you relied upon in the preparation of your estimate of damages was either wrong or incorrect?

A. No. * * *

THE COURT: Dr. Morse, your projection for the first year of operation of this business shows roughly $2 million of profit -- is it fair to call it profit?

THE WITNESS: Yes.

THE COURT: -- on $3 million of sales. Do you have a measure of how profitable that enterprise is?

THE WITNESS: That's a very profitable enterprise, if that's what Your Honor is getting at. * * * This * * * would have been * * * a very profitable business. Are you asking if that's an unusually high profit margin?

THE COURT: * * * How would you describe, how would you quantify that profitability?

THE WITNESS: That would be a profit margin well in excess of 50 percent.

THE COURT: And what would you say the return on investment would be?

THE WITNESS: Well, I have not -- that's a good question, sir. I have not been provided with the capital costs in their entirety. I've been provided with estimates that I believe were dignified [sic] of the revenue and the costs.

To the extent that I looked at capital, I annualized it or I annuitized it. That would be the land value and the equipment value. * * *

So looking at the profit as a percentage of capital, you still would see * * * an extremely profitable business which has been discussed today.

**Deposition Testimony of Harry Thomas:**

[DE 113, pp. 286-88]:

"Question: Mr. Thomas, you are a member of the D.C. Council representing Ward 5; is that correct?

"Answer: Yes, I am. * * *

"Question: You are also chairman of certain committees; is that correct?

"Answer: Chairman of the Public Works and Environment. * * *

"Question: Did you or your office have any contact with DCRA after this meeting, and I'm talking after September 20, 1993, regarding this project?



"Answer: Officially, I don't think we had any. * * *

"Question: What about unofficially?

"Answer: I might have seen Hampton someplace and said to him that because of opposition we had some problems there. * * *

"Question: But you did indicate to him that you were opposed to this project going forward?

"Answer: I made that loud and clear."

**Deposition Testimony of Hampton Cross:**

[D.E. 113, p. 290]:

"Question: You indicated earlier, Mr. Cross, that you had a conversation with the mayor's office following the September 20 meeting. Who was that with?

"Answer: That was with Mayor Kelly. It was with Mayor Kelly. It was a meeting.

"Question: Who else attended that meeting?

"Answer: Two or three, I don't recall how many, I don't even know if you call them representatives. Two or three members of the community, who lived in the community around the Tri County facility, and also Claude Bailey, who was the Deputy Corporation Counsel attended the meeting.

**Deposition Testimony of Francine Howard James, Executive Officer, D. C. Board of Appeals and Review:**

[D.E. 113, pp. 294-95]:

> "Question: What is the purpose and function of the board?
>
> "Answer: The purpose of the board is to hear appeals from aggrieved citizens who are dissatisfied with final decisions and orders that they receive from the Department of Consumer and Regulatory Affairs * * * .

**[DE 113, pp. 309-23 -- Argument of Counsel]**:

> MR. EMIG: * * * [W]hat concerns me is evidence -- of him coming in with evidence that their neighbor -- there are houses in the vicinity. That's very prejudicial when he can't tie that in to any basis for having the permit suspended, Your Honor. I think he's just playing on the prejudices and concerns that really got this project sidetracked in the beginning. I mean, I think he needs to establish there were some grounds.
>
> THE COURT: Well, where are we going here, Mr. Bolden? What are you going to prove? Or try to prove?
>
> MR. BOLDEN: Well, our case in part is that the project would have been suspended anyway or that the project would not have gone forward for various reasons. * * *
>
> THE COURT: Like what reasons?
>
> MR. BOLDEN: Well, one very obvious reason is that there were health and safety



> concerns that Hampton Cross had, as well as the community had, which impacted on the health and safety of that community. * * *
>
> We -- again, in terms of Carey versus Piphus, that's our case, that the project would not have gone forward for various reasons. * * *
>
> THE COURT: * * * You mean there is going to be another whole layer of approvals?
>
> MR. BOLDEN: We're not saying a whole layer of approvals, but certainly any project which presents a health risk or a danger doesn't have carte blanche to operate. There has to be a process by which * * * adjustments are made. * * *
>
> THE COURT: Given the Court of Appeals' ruling -- and I think Mr. Emig is correct to this extent, that the Court of Appeals has ruled that the suspension order was unlawful -- by what procedural means or mechanisms could or would the District have acted to take that second look once you -- understanding that it already had issued am [sic] air quality permit and a building permit?
>
> What additional permits were necessary?
>
> MR. BOLDEN: Well, first of all, Tri County had no permit to do business there.
>
> THE COURT: Right.
>
> MR. BOLDEN: Hadn't applied for it. Hadn't been granted. So it still had to go through the -- the panoply of inspections by various entities of DCRA.
>
> THE COURT: Can you be a little more specific about this? I mean, this -- what did it

need? What permit, what precisely -- precisely what permit did it need?

It had a building permit. It had an air quality control green light. What permits did it need?

MR. BOLDEN: It did not have a certificate of occupancy.

THE COURT: All right.

MR. BOLDEN: Which permitted it to do business.

THE COURT: Is there any discretion on the -- in the board -- or whoever the issuing agency is -- to issue a certificate of occupancy if the building conforms to the building permit?

MR. BOLDEN: Well, there are inspections by various entities, including the fire department, zoning, electrical department, so there's still a range of inspections that had to * * * undergo.

In addition, the equipment that Tri County proposed to use had to * * * undergo a -- an additional round of emissions tests, under the air quality permit. They couldn't -- they couldn't do anything with that permit until they brought the equipment here and tested it.

THE COURT: Okay.

MR. BOLDEN: The equipment had not been physically at 2115 Bryant Street. It had -- the initial approvals are based on a 1991 stack test on New York Avenue.

THE COURT: Okay. Fine. But electrical tests, fire code tests, stack tests -- assume with me -- and I think it's fair to assume that Tri County would pass all those tests * * *. I mean, if they didn't, that's another round. But



you're talking about new concerns about health and safety issues.

Now, unless the District of Columbia were to change the standards for stack gases and particulates, which they had not done, then I think we have to assume that the machinery would pass the same air quality test on Bryant Street that it had passed on New York Avenue.

Now, what different -- what areas of health and safety does Siess say would now be raised, and how except for a certificate of occupancy would they be raised? What other permit did they need?

MR. BOLDEN: Your Honor, there's a whole area of handling of this material, and it had to be handled in such a way that it protected the community. There had to be plan[s] for transporting it through the community. There had to be plans for -- there had to be some way of overseeing how this material was -- passed through the community.

It turned out later on that there had been misrepresentations in the initial application concerning where the residential houses were. I mean, all of that had to be dealt with, which is why there was the issuance of this October 15 letter concerning information that was needed.

THE COURT: Do you disagree with this gentleman's testimony that everything asked for in that October 15 letter had already been provided to the District? * * *

MR. BOLDEN: Yes. I disagree. I don't agree.

THE COURT: * * * I share some of Mr. Emig's concern about your wa[]ving a lot of health and safety concerns in the community as if health and safety concerns would ultimately doom this project.

You haven't given me an answer that I find acceptable yet to the question of what legal mechanism would have stopped this project.

The health and safety concern question, obviously we'll have experts on both sides of this. We have experts on both sides of any question. But we already have one man who says this is like working in a gas station.

You don't believe that. * * *

I will say, however, Mr. Bolden, that it is conceivable that after hearing the testimony of a witness expressing generalized health and safety concerns, it is conceivable that I will hear the testimony and strike it.

I thought that your Carey and Piphus showing would be a much more targeted showing to the effect that it is established District of Columbia -- for example, it is established District of Columbia law that a building permit and an air quality control permit don't cut it; that a certificate of occupancy doesn't cut it; that there's another permit required under established D.C. regulations, and that permit is called an operating permit. And that under District of Columbia law, before Tri County could obtain an operating permit, it had to make a new showing on the basis of plans, et cetera, et cetera, that there would not be any deleterious effect on the health and safety of the population. And these are the established



standards and it is clear from the record that Tri County could not have met these established standards.

Now if you can make that kind of showing, make it * * *.

**[DE 112, pp. 337-41 -- Ruling of Court on defendants' motion for judgment as a matter of law]:**

THE COURT: * * * Now, the future earnings case, I think, is a much more difficult one. It seems to me that what is missing from this record -- but I'm going to consider it further -- seems to me what is missing from this record is evidence that -- is evidence of the market for processing all this soil.

Now, I know there's an expert who said, "Oh, yeah, there's enough soil around here to bring 75,000 tons a year." Sure, there's plenty of soil around; but you need more than soil, you need some established position in the marketplace.

This -- there's nothing in the calculations of any of these experts that there's any buildup. This company is going 75,000 tons a year from day one of these calculations, all the way through, full capacity. No evidence about how he gets there, how he markets it, how he's going to make this thing run. And the expert -- the financial economist conceded that the profitability figure for this company is extraordinary.

It looks very speculative to me. Now, I'm going to consider this further between now and the time this case goes to the jury. I'm not

sure I'm going to sent the future earnings question to the jury. If I do, however, it will be with the same ruling that I'm making now, which is to -- which is the conditional ruling that Rule 50 requires.

I'm denying the defense motion for judgment as a matter of law, conditional on its being renewed at the close of all the evidence; and, if I send these issues to the jury, conditional on it being renewed again after the verdict.

I think there is a hinge here somewhere between the past -- between the money that Tri County sank into this enterprise of $600,000 and future earnings. The hinge has something to do with mitigation. It is one thing to say, as Tri County does say, it would have cost us a million dollars to save $600,000 because we would have had to buy the equipment and wait out an appeal.

That's perfectly understandable and maybe a complete defense to the mitigation claim with respect to the monies that were spent and lost; but for Tri County to make that decision, walk away from this, and then go for all of the future earnings without sinking the money into the appeal and going the next step to mitigate or to hang in there in a way that would permit them to pursue future damages may -- I say "may," because I'm not ruling at this time -- may as a matter of law mean that they're not entitled to future profits.

So my view of the future profits question at this point is that the evidence -- although I have to say, Mr. Emig, you did a very careful workmanlike job of putting in all the elements of that spreadsheet. Still what you have is a spreadsheet; you have a pro forma, without, it seems to me, very good proof either that the company could actually start up and do it or that there was a market for the numbers in the spreadsheet. And secondly, as I say, I've got this problem with mitigation. * * *



There's a line in your expert's report about how the competition is driving down the price per ton until it just covers operating costs.

MR. EMIG: Uh-huh.

THE COURT: And that that has driven one of the competitors out of business because he tried to take on too much. He didn't cover his operating costs.

Your numbers do a lot more than cover operating costs. They cover operating costs and return a profit of over 50 percent.

MR. EMIG: Right.

THE COURT: There's a query whether your own evidence establishes that you really have a market-competitive product here. So I hear you. Tri County digs the stuff up itself, trucks it someplace.

MR. EMIG: That's right.

THE COURT: Whether it can -- whether it can sell its own services at that price and deliver that profit is another question that I don't really think is what -- I think what I'm inclined to do is to let the jury decide how speculative that is and then go back and look at it with the luxury of a little hindsight and determine -- and if they -- if they think it is not too speculative, then, of course you have a leg up, but then I

will have to decide how speculative it is as a matter of law and whether they should have had the case in the first place.

**Testimony of DCRA Inspector Juan Berrayarza**

[DE 112, pp. 342-47 -- Direct Examination]:

A. I am employed by the District of Columbia as a zoning inspector for 27 years. * * *

Q. I direct your attention to what's been marked as Defendant's Exhibit 1. * * * What is that document, sir? * * *

A. This is a citation that was written on the premises of 2115 Bryant Street, Northeast * * * on the 7th of September, 1993. * * * I was there because my supervisor at that time, he sent me to make an inspection * * * based on complaints from the neighborhood that --

MR. EMIG: Objection.

THE COURT: Sustained. * * *

A. So I gave a full account of my inspection.

All right. The building had been occupied as an office on the front, and in the back was a building that was a big room that was full of soil, a big pile of soil. So I get in there and I'm trying to take a picture of the soil, you know, because my Polaroid camera and the picture never came out because the room was so dark.

So when I was there, I had some eye irritation because the fumes, the stink was coming out from the soil.

THE COURT: Overruled.



BY MR. BOLDEN:

Q. Okay. When you went to the premises, what, if anything, did you do?

A. So I got -- because the door was opening and I'm trying to see what was there. It was -- there was nobody in the building because the office had been locked.

Q. Okay. Did you -- did you draft that citation, sir?

A. Yes, sir. I wrote the citation when I went back to my office to check on all the records to see if there was a certificate of occupancy for this use, and I couldn't find anything in the file. So I proceeded to write a citation on the -- based on the regulation of the D.C. Code. * * * That regulation was 3203.1, building occupied, industrial soil remediation business without a certificate of occupancy. * * *

Q. What is a certificate of occupancy?

A. There is such a certificate that the zoning regulation required to have use of any property in D.C., any other use, or single-family dwelling is supposed to have a certificate of occupancy in the city. That's the regulation. * * * Without certificate of occupancy, there was subject to a fine. * * *

Q. Okay. And what does the citation require that Tri County do?

A. Well, they must have it on file in order -- well, they -- they -- right to operate the business until all the inspection has been performed, you know. They had to have a building inspection, plumbing, electrical, zoning, fire. They were in -- when they responded, has been approved, they can obtain a certificate of occupancy after

paying for the fee. They can operate the business. * * *

Q. Was there a fine associated with that citation, sir?
A. There was a fine.
Q. $500 fine?
A. Yes, sir.

[DE 112, pp. 348-50 -- Cross-examination]:

Q. Isn't it correct that Tri County could have paid that ticket for $500; is that true?
A. They should have been paying after all these years.
Q. They could have at any time paid that ticket; is that correct?
A. Correct.
Q. Now the second question I have is this.
A. Uh-huh.
Q. They could have either removed the soil --
A. That's right.
Q. -- or they could have gotten a certificate of occupancy?
A. Correct. * * *
Q. Either of those two things plus payment of the ticket would have resolved this entire problem; is that true?
A. Exactly.
Q. Now, you get a certificate of occupancy * * * when you complete your renovation on the building?
A. That's right. * * *
Q. You go out and you look and you make sure that all of the work that they say they're going



to do in their building permit application has been done correctly?
A. Exactly.
Q. That's all? Then you get your certificate of occupancy; that true?
A. Correct, if they comply with the zoning regulation.
Q. Well, they wouldn't have gotten the -- if they weren't in compliance with the zoning, they wouldn't have gotten the building permit in the first place?
A. Right. That's right.

**Testimony of DCRA Inspector Phillip Thomas**

[DE 112, pp. 351-55 -- Direct Examination]:

A. I'm a construction inspector with the District of Columbia. * * * The Department of Consumer and Regulatory Affairs.
Q. How long have you been employed with the Department of Consumer and Regulatory Affairs?
A. 16 years, sir. * * *
Q. Directing your attention to the month of September 22, 1993, did you have an occasion to visit 215 [sic] Bryant Street, Northeast?
A. Yes, sir. * * *
Q. What did you see?
A. I saw someone was storing a lot of soil in the building. * * * There was a gentleman I spoke to. * * * I asked him who's in charge. He said his boss was not there.

BY MR. BOLDEN:

Q. Did it appear he was working there?

A. He was working there, sir.
Q. What was he doing, sir?
A. He was by the weight station.
Q. On that day, what, if anything, did you do at 2115 Bryant Street?
A. I was told to issue a stop work order.
Q. Why was that, sir?
A. Because there was no CO for the job, what they were doing on the site, sir.

THE COURT: Was no what, sir?

THE WITNESS: CO, certificate of occupancy for the building.

BY MR. BOLDEN:

Q. What is a certificate of occupancy, sir?
A. Sir, in the District of Columbia before you -- before you could use a building for any business, you are supposed to have a certificate of occupancy.
Q. And did you notice or did you observe whether the building was being used for business?
A. It was being used for business, sir. * * * Sir, I saw that -- the dirt, I saw the weight station, the guy was in the weight station there. * * *
Q. I show you what has been marked as Defendant's Exhibit No. 5. * * *
A. It's a stop work order for no CO.
Q. Okay. And did you sign that document, sir?
A. Yes, sir. * * * I served a copy of the stop work order to the gentleman. I gave it to him and instructed him * * * he could appeal the stop work order. I said, from now on you are stopped from what you are doing here. I said, you could appeal the stop work order by talking to Mr. Vincent Ford, my program manager.



Q. Did you post a copy of that?
A. I did post a stop work order on the building. * * * It's a big yellow copy, sir, bright orange.

[DE 112, p. 361 -- Cross Examination]:

Q. So either they appeal it, they take the soil out, or they get a certificate of occupancy? Any one of those three things, assuming the appeal is successful, and your stop work is gone?
A. Yes.

**Testimony of DCRA Employee Lennox Simon**

[DE 112, pp. 362-67 -- Direct Examination]:

A. I'm employed in the Office of Adjudication, the Department of Consumer and Regulatory Affairs. * * * The Office of Adjudication is the adjudicative arm of the department. We conduct all of the administrative hearings under the jurisdiction of the DCRA.
Q. I show you what's been marked as Defendant's Exhibits 2 and 3. * * *
A. The first exhibit is an official decision and order of the Office of Adjudication which was issued by Attorney Examiner Rohmular Quander. * * * It was issued on October 25, 1993.
Q. What was the nature of that proceeding, sir?
A. This was a matter that came before the office on the operation of a business in the District of Columbia without a valid certificate of occupancy. * * * The hearing was on October 13, 1993.

Q. And what occurred at that hearing, sir?
A. Looking at the official record of hearing, the respondent failed to appear at that hearing. The inspector who issued the citation appeared and gave testimony under oath as to his observation of the location and what he saw on the day of infraction, which was September 2, 1993.
Q. Okay. And did the Court decide the case?
A. Yes, it did. Also looking at the other document, which is entitled "Capsule," it shows there were several attempts made by the Office of Adjudication to contact the respondent telephonically. There were calls backward and forward, and the respondent also wrote a letter to the department indicating that -- well, basically denying that there were any business activities being conducted at that location.

And based on that information, Attorney * * * Quander proceeded with the hearing. He found there was adequate notice of the violation and proceeded with the hearing.

Q. What, if anything, did he determine?
A. Well, based on the information provided by the inspector, the zoning inspector, he found the respondent liable, upheld the original fine, which was $500. He then assessed a penalty for the respondent's failure to appear at the hearing of a thousand dollars, and he also assessed $25 in court costs for a total of $1525. * * *

The order was mailed out to the respondent on November 3rd, 1993. I have a certificate of service of that as well. * * *



Q. And does the capsule summary itemize the dates and times when attempts were made to notify Tri County?
A. Yes, it did. It shows that on November 30, 1993, on December 7, 1993, December 13, January 6 of 1994, and January 10 of 1994 there was attempts made to contact the respondent.
Q. Okay. I show you what's been marked as Defendant's Exhibit 4. * * *
A. That is a letter from the office of the controller, which is another branch within the Department of Consumer and Regulatory Affairs, and that office is charged with collecting all fines and penalties for the department. * * * It is dated January 12, 1994. * * * Basically it informs the respondent that he had a final decision, an order was issued on this matter, assessing $1525 in fines. There has been no appeal taken from that decision, which means you have 15 days in which to appeal. It is now final, and the respondent has to make payments on that; otherwise, the matter will be referred over to the Corporation Counsel for criminal prosecution to enforce that judgment.
Q. And is there additional language in that document?
A. Yes. To cease and desist the operation of the business until such time as a certificate of occupancy is issued for that particular activity that respondent was engaged in. * * * It also, as the act -- the civil infractions act provides the -- for the suspension of various licenses and certificates unless the fine is paid, so it is an

enforcement tool used to -- by the department to collect the fines assessed.

[DE 112, pp. 372-75 -- Cross Examination]:

THE COURT: * * *

This form that is Exhibit 2 says at the bottom of the back of it "Respondent's failure to appeal this decision or to arrange for payments of all fines, penalties, and costs within 15 calendar days of service of this decision shall operate to suspend automatically the license or permit until the assessment is paid."

What does this mean "operate to suspend automatically the license or permit"?

THE WITNESS: * * * [W]hat that means, Your Honor, is that on the 16th day the license or permits or certificates will be suspended by operation of law.

THE COURT: And does another piece of paper have to issue to get that done?

THE WITNESS: No, Your Honor. * * *

BY MR. EMIG:

Q. But they don't indicate in this letter that any permit has been suspended, do they?
A. They don't. They didn't. But the decision and order speaks for itself. It says it would be automatically suspended, and that decision and -- the decision and order was mailed to the respondent.
Q. Okay. If -- how is that matter corrected and that suspension lifted?
A. Once the respondent has paid the fine, penalties, whatever that's due, then that license permit certificate would be reinstated.



Q. That's all that's required?
A. That's all that's required.
Q. To pay it?
A. It's just an enforcement mechanism to collect the fines, penalties, et cetera.

**Testimony of DCRA Director Hampton Cross**

[DE 112, pp. 377, 394, 396-99 -- Direct Examination]:

A. I was the acting director of Consumer and Regulatory Affairs from, I believe, September of '93 to, I think, January of '94. * * *
Q. Okay. And the Director?
A. From January of '94 to August of '97. * * *
Q. Why was that letter [letter dated October 15, 1993] sent to Tri County, sir?
A. My best recollection is that it was sent to -- well, to establish a process which would afford -- which would resolve the issues that had arisen, to establish a process and to get the necessary information from Tri County.
Q. Okay. And do you know if Tri County responded to that letter?
A. No, they did not. * * *
Q. What do the initials CA, what is that commonly known as in the District of Columbia government, sir?
A. City administrator.
Q. Who was the city administrator at that time?
A. Mr. Robert Mallett.
Q. What is Mr. Mallett's responsibilities in the District of Columbia government? * * *
A. As the city administrator, he was responsible at that time for the overall operation of the Dis-

trict of Columbia government. * * * I have no recollection of any conversations with Mr. Mallett regarding Tri County. * * *

A. In December of 1993, I recall being advised by the staff that we had not received any response to our letter * * * dated October 15, 1993. And the question was, having received no response, what should we do.

Q. Okay. And what was done?

A. We issued them a letter revoking the building permit. * * *

Q. Okay. What is the date of that letter, sir?

A. December 6, 1993.

Q. At paragraph 3, paragraph 4, sir -- * * * will you read that, sir?

A. "Furthermore, the original environmental approval was based on information provided by you on the environmental impact screening form stating that your facility would be over 700 feet from the nearest residential house. You failed to bring to our attention the fact that there is a single-family residence directly across the street from your facility less than a hundred feet away. We are concerned that this home, as well as the proposed DHCD housing project, are much too close to your facility to not be impacted by the emissions from the treatment process and potential emissions from contaminated soil stored at the facility or transported throughout the neighborhood."

[DE 112, pp. 404-07, 412-13 -- Cross Examination]:

Q. You do not know when that October of '93 letter was sent to Tri County whether or not



you had already received that particular information that is listed in your letter?

A. At the time the letter was sent, my best professional information at that time was that we did not have the information that we were requiring in this letter. * * *

Q. Are you aware of any legal authority that would permit you to ask for more information from a permit holder after the permit has already been issued?

A. I don't know any specific code citation, sir, but as a professional, when matters come before you that involve life safety --

MR. EMIG: Objection, Your Honor. I move to strike that.

THE COURT: You asked the question.

THE WITNESS: When matters come before you that involve life safety as a public official, you have a responsibility to ask for additional information. * * *

Q. Is it true, Mr. Cross, that the Board of Appeals and Review is merely the reviewing agency that does the will of the mayor?

A. That's not correct.

Q. Did you ever testify to the contrary?

A. My previous statement is that I do not recall testifying to the contrary.

Q. Is it true that there are two ways of handling the situation before the Board of Appeals and Review; one, that you could ask the board to take a different position or, two, that the mayor or chief of staff, Robert Mallett, could tell the Board of Appeals and Review to reverse its position?

A. Sorry. Could you repeat your question.

Q. Is it true that the mayor or the chief of staff, Robert Mallett, could tell the Board of Appeals and Review to reverse its position?
A. That's not true.
Q. Did you ever testify to that?
A. My best recollection is that I did not testify to that.
Q. Let me show you a portion of your transcript from your testimony in the Samaritan Inns case. * * * Is it true that you, in fact, testified differently before the -- this Court?
A. Based on that transcript, it is correct. Based on that transcript, I did say that.

[DE 112, pp. 414-18 -- Redirect Examination]:

A. The Board of Appeals and Review is not a -- is an independent -- is an independent agency. * * * It doesn't do the bidding of anyone. It is an independent agency, making independent judgments.
Q. So you were mistaken in that day?
A. I was absolutely mistaken. Absolutely. * * *
Q. Concerning adverse environmental impacts, if new information came to your attention which you determined had impact, environmental impact on a project such as the one Tri County was involved in, what, if anything, would your agency do, sir?
A. It depends, counsel, on where the project is. * * * If the -- if the project is -- the proposed construction is completed, then you would take steps to delay or suspend issuance of any final approvals or -- so that to make sure that the project did not go -- did not go into effect until



we had assured ourselves that any -- that any -- that there would not be any adverse impact on the surrounding area. * * *
Q. Why did you send the October 15 letter to Tri County? * * *

THE WITNESS: As a follow-up to the meeting where I -- where I moved to suspend the permit to establish a process which -- a fair process which would allow Tri County to provide us with the information to resolve the questions about whether or not there would be any adverse impact on the community.

**Testimony of DCRA Chief James Sweeney**

[DE 112, pp. 419-29 -- Direct Examination]:

A. I'm employed at the District of Columbia government, Department of Health, Environmental Health Administration. * * * I've been with the District government for a little over 25 years. * * * Right now, I am chief of the hazardous waste management division within the Environmental Health Administration. * * *
Q. I show you what's marked as Defendant's Exhibit 7. Have you seen that document before? * * *
A. This is a document called a supplemental environmental questionnaire. * * * It is part of the building permit application.
Q. Okay. And did there come a time when that document was presented to you?
A. Yes. * * * [T]he signature of the person who filled out the form is Calvin Franklin. * * *

Mr. Franklin was a representative of Tri County Industries, who had applied for the permit to do this project. * * *

Q. Okay. Now, I draw your attention to, I believe it is page 2, the last question on page 2. * * * What does that say, sir?

A. The question is, "Will the proposed project result in an increase in vehicular traffic in the area surrounding the project?" And it is -- someone has written next to that question, "A little employee." And the question is answered "Yes."

Q. Okay. And did it come to your attention subsequently that there was somewhat more than a little employee? * * *

A. I can't remember exactly when, but the more than a little employee parking meant that there would also be trucks coming into and out of the neighborhood with contaminated soil in them.

Q. I show you what has been marked as Defendant's Exhibit 8. Do you recognize that document, sir? * * *

A. This document was written in response to a meeting that was held on September 20, 1993, where we received some information concerning the area around 2115 Bryant Street, Northeast. This information had to do with the proposed construction of a housing project by the D.C. Department of Housing and Community Development very close to the proposed facility. * * * It is addressed to Mr. Glenn D. Selzer, president, Tri County Industries.

Q. Okay. What sort of things were you asking for in that letter, sir?



A. * * * There are 10 things we ask for. I will paraphrase them so we don't waste too much time.

We are first asking for the total cost of the proposed project, including the cost of the remediation equipment to be installed, the cost of construction materials, and the labor costings.

Number 2, the expected amount of soils in tons to be processed per day at the facility.

Number 3, the number of truck trips into and out of the facility per day.

Number 4, the proposed routes of the trucks through the neighborhood into and out of the facility.

Number 5, the proposed hours of operation.

Number 6, current conditions of the facility property regarding pest infestation, dust, and odor.

Number 7, contingency plans, if any, for the control of pests, dust, and odor.

Number 8, proposed means for washing the facility and methods for disposing of wash water.

Number 8, a typo I find four years later. The second number 8, actually number 9, I guess, is the distance of the facility from the adjacent property proposed for development. There's some instruction here on how to measure that distance. * * * It finishes with, "Thank you for your timely submittal of this information."

Q. Do you recall that Tri County responded to that letter, sir?

A. They did not.

Q. Okay. Directing your attention to the request concerning truck traffic, * * * was there a reason for asking that question, sir?

A. Well, originally, when we first looked at the site in their original application, * * * we weren't concerned too much with truck traffic because it was our understanding that there were no residences nearby.

However, through this meeting on September 20, we found that there were going to be the proposed housing project. We also went out and actually looked at the site and found that there were residences directly across the street from it. So we were extremely concerned about trucks going back and forth, both from a health, or public health standpoint and from a public safety standpoint. * * *

We were of the understanding that the closest residence was 700 feet away, which would put it down here or out here somewhere (indicating).

Q. What was the basis for that understanding?

A. The letter we received during our initial review of Tri County's environmental impact screening form. They stated that the closest residence was 700 feet away.

Q. And, in fact, how far away is the closest residence?

A. Right here, probably 50 to 70 feet directly across the street from the entrance.

Q. And what other residences would you estimate are closer than 700 feet away?

A. I would say every residence * * * that's in blue here is within 700 feet. And possibly these



yellow residences too; I haven't measured that, so I don't know. * * *

Q. Why were you concerned about trucks on Bryant Street?

A. Well, for health reasons and safety reasons. You have homes, you have children that are using the streets all the time.

There's a park here. Kids would be crossing the street to get to the park all the time. We're concerned about safety there.

As I stated before, we have the trucks going by with contaminated soil in them. That contamination tends to volatilize out of the soil, and it would be into the atmosphere, what we call the ambient atmosphere around the area, and it could possibly impact the health of the people in the area.

[DE 112, pp. 435-36, 439-40 -- Cross Examination]:

Q. You concluded, based upon your review and your discussions with other DCRA officials, that this project would not eminently and substantially affect the public health, safety, and welfare; is that correct?

A. That's correct. * * *

Q. Are you aware that the -- in their pleadings in this case, the District of Columbia has admitted that they did an extensive review of the plaintiff's application for this facility including visits to the site? * * *

A. I suppose I am, yes. * * *

Q. In your opinion, would there be an escape of the contaminants from the petroleum -- the soil

with petroleum in it into the atmosphere from this facility?

A. If the soil was kept inside the facility, in my opinion, there would not be an adverse emission of contaminants from the soil.

Q. So that the facility itself would not have -- the operation of the facility would not have an adverse effect on the homes that are surrounding the property?

A. As far as keeping the soil inside the building? That's correct.

Q. And the operation, the intended operation was for the plant and the soil to be inside the building?

A. That's what I understand, yes.

Q. When this permit was suspended by Mr. Cross, Mr. Cross directed you to write to Tri County Industries and to get more information; is that correct?

A. I don't know if it was Mr. Cross or Mrs. Bishop that directed me to, but one of them did.

Q. That was the reason that you prepared and sent out your letter of October 15, 1993, --

A. That's correct. * * *

Q. Would items 1 through 9 in that letter, Mr. Sweeney, normally have been looked into by DCRA in connection with their application -- with the application for a building permit that Tri County filed?

A. We expect someone to ask these questions, yes.

Q. Someone from DCRA?

A. Yes.

Q. Before you sent this letter out to Tri County requesting further additional information, did you ask anyone in DCRA regarding their investigation to see if they already had this information?



A. Not that I can recall, no. * * *

[DE 112, pp. 432-35, 441-42 -- Cross Examination]:

Q. Mr. Sweeney, isn't it true that all of your concerns about this project are matters that should be considered when a building permit application is filed?

A. Yes.

Q. You yourself do not review issuance of building permits; is that correct?

A. Only one very small portion of it.

Q. You did not review the Tri County Industries application for a building permit?

A. No, I did not.

Q. What you did, essentially, I think you testified, was to coordinate the review of the different branches of the Department of Consumer and Regulatory Affairs?

A. Different branches within the Environmental Regulation Administration of the Department of Consumer and Regulatory Affairs.

Q. If you would take a look at Defendant's Exhibit No. 6, what is that, please?

A. That is an application for construction permit on private property.

Q. When was that application filed?

A. July 1, 1992.

Q. That's the Tri County application for this project?

A. That's correct.

Q. Okay. And the form of this application is on the last page, they have various departments

that have to sign off indicating their approval; is that correct?

A. That's correct.

Q. Does your signature appear anywhere?

A. Yes, it does.

Q. Where?

A. Under number 6 for Environmental Regulation Administration, where it's checked "environmental policy review."

Q. When did you sign off on this?

A. November 6, 1992.

Q. So from an environmental policy review standpoint, you approved on November 6 the issuance of this building permit?

A. Based on the information we had at the time, yes.

Q. Okay. During this time, you also knew, did you not, that dump trucks were going to be carrying the soil into this facility?

A. Yes, I did.

Q. And you knew from the application that the plant intended to treat approximately 75,000 tons of soil on an annual basis; is that correct?

A. Where on the application does it say that?

Q. Well, why don't we look at Defendant's Exhibit 10. * * * Page 3. * * * What does that indicate?

A. It indicates that there will be a quantity of 74,880 tons per year.

Q. Okay. So when you signed off on this application, you knew, A, that they were going to use dump trucks, and you knew, B, how much soil they intended to process; is that correct?



A. No, that's not correct. I had not seen this permit for constructing and operating process equipment at that time.

Q. Okay. Well, why didn't -- did you request to see it?

A. No, I did not.

Q. Who had it?

A. Who had it at that time? Mr. Wamsgans from the Air Resources Management Division.

Q. And he was -- that's part of DCRA also?

A. That's part of DCRA. His Division was reviewing this permit application. * * *

Q. Are there other means of access to the property other than Bryant Street?

A. I didn't search for any; but as far as I can tell, there are few, if any.

Q. What about Lawrence Avenue?

A. I suppose you could maybe come off of, I guess, Montana Avenue or 18th Street and get onto Lawrence, I'm not sure.

Q. Why don't you tell the members of the jury the type of businesses that are on Lawrence Avenue. Are they homes?

A. As far as I know, there are not homes there.

Q. What are there?

A. Junk yards, trash facilities; I don't know every one down there.

Q. Commercial and industrial businesses?

A. It's commercial and industrial.

Q. Do you know if the applicant planned on having the dump trucks covered when they came into the facility?

A. According to the information from the applicant, yes, they would be covered with tarpaulin.

Q. Do you know where the soil equipment was to be located within the building?
A. Exactly? No. * * *
Q. Did you ever observe any trucks go into the facility?
A. At the time I was there, no.
Q. So you don't know which route they actually took, do you?
A. No, I don't.

[DE 112, pp. 442-43, 446 -- Redirect Examination]:

Q. Mr. Sweeney, in your letter of October 15, 1993, * * * you requested information concerning the proposed routes of trucks through the neighborhood into and out of the facility. * * * And why did you request that information, sir?
A. 'Cause we didn't have it. * * *
Q. And if Tri County planned to burn 25 tons per hour roughly, how many trucks would come through that neighborhood each day? * * *
A. 20-ton truck? 25 tons per hour? A little over a truck per hour. * * *

THE COURT: If the District had already decided that there was no environmental impact statement requirement, why is it that you referred to a provision of this environmental impact statement requirement statute to send this letter out?

THE WITNESS: I think further on in the law it talks about supplemental information; and if we determined that there may be other information or new information concerning the



project, we can go back and request further information from them, the applicant.

THE COURT: Did you have any authority for asking the questions in that letter of October 15, 1993 except the authority vested in this Title 6, Section 983?

THE WITNESS: None that I know of.

**Testimony of BAR's Executive Officer Francine James**

[DE 112, pp. 448-50 -- Direct Examination]:

Q. * * * And you're executive officer of what office?
A. The Board of Appeals and Review. * * *
Q. Pursuant to the regulatory scheme of the Board of Appeals and Review, it there a provision * * * for emergency appeals?
A. There's a provision for the emergency appeals in the rules of procedure. * * *
Q. What about stay orders, stay orders of orders issued by agencies; is there provisions for that as well there?
A. There is a provision for the chairperson to hear a stay order only if it has been denied by the agency. * * *

THE WITNESS: Motions for stays are not set down for hearing. Motion for stays are reviewed by the chairperson. He determines whether he would grand [sic] the stay. If he does not grant the stay within 30 days, then the decision from the director of the department becomes final.

[DE 112, pp. 451 -- Cross Examination]:

Q. Isn't it true that it would be speculation on your part to give us an opinion as to how long it would take an emergency appeal to be resolved by the board?
A. To be resolved?
Q. Yes.
A. Or to be heard?
Q. To be resolved.
A. Yes. That's speculation.

**Colloquy: Court and Counsel**

[DE 112, pp. 452-54]:

THE COURT: This is Siess? * * * This is the expert?

MR. BOLDEN: Yes, sir. * * * Well, it is relevant to two things. First of all, the plaintiffs have put on a person who explained the process. He concluded his testimony with that the process is a safe -- as safe as pumping gasoline at a gas station.

THE COURT: He did say that.

MR. BOLDEN: I think that it -- fairness would dictate the District have an opportunity to put on its views as to * * * whether or not it is as safe as pumping gas in a gas station. * * * Secondly, it is our view that certain kinds of -- certain parts of this project would have required that it be stopped anyway.

THE COURT: Like what?

MR. BOLDEN: Well, the process, the closeness of the proximity of the facility to the



residential facilities, residential homes, the trucks going through the neighborhood.

THE COURT: Well, you've got a little problem. You just had a witness on the witness stand who said he knew of no authority for asking the questions in the October 15 letter except under the D.C. Code section.

I don't read the D.C. Code section the way he reads it. The D.C. Code section relates to environmental impact statements, period. Environmental impact statements were waived, were they not?

MR. BOLDEN: They were waived based upon the information that DCRA had at the time. The Court will recall there has been evidence that some of the information was incorrect, some of the information was misleading, and that there was -- there were new -- new information came to us which showed -- dictated that we proceed in a fashion which protects the residents, that there was --

**Proposed Testimony of Alfred A. Siess**

[DE 112, pp. 455-62 -- Direct Examination]:

A. I'm presently employed as an economic environmental consultant, and my background is a degree in civil engineering, and I have an MBA and 40 years of experience.
Q. With respect to the process of cleaning contaminated soil, are you familiar with that, sir?
A. Yes, I am.
Q. Okay. And how familiar are you with that process, sir?

A. Well, I've been involved in a great many -- as a consultant in a great many of these low-temperature thermal treatment unit applications. I have reviewed applications for probably two dozen or more companies, including about six or eight in Pennsylvania that use Gencor Thermotech equipment.

Q. And are you familiar with the process?

A. Yes, I am.

Q. Would you just briefly * * * describe the process for --

A. Well, the process basically is considered as a viable alternative for doing on-site remediation of certain very well-defined contaminated soils. It is basically just a process where you drive off the volatile compounds and then treat them in some way, either by passing the gases through a carbon filter or by burning them in an afterburner, oxidizing the gases.

The process is not suited for many different types of contaminated sites, including some petroleum-contaminated sites.

Q. There's been testimony here that the processing of contaminated soil through this process is as safe as pumping gasoline in a gas station. Do you agree with that, sir?

A. Absolutely not. First of all, the -- pumping gasoline at a service station is not necessarily a very safe endeavor. * * *

The remediation, using any type of system that requires excavating the soil, and particularly systems that require adding heat to the soil such as low-temperature thermal treatment, add a host of other problems that make it much



more serious of a threat to public health and the environment. * * *

Well, first of all, it is generally recognized that the thermal treatment of petroleum-contaminated sites which came about in 1984 when EPA established their underground storage tank program, is generally considered that the treatment should be on-site with mobile units.

The reason for that are, first of all, if there were no dangerous materials in the products, the gasoline and whatever, there would be no need to remediate at all.

But the UST program established that left in the ground, petroleum products are a grave cause for concern. That happens several different ways. One, the volatile organic compounds will be emitted to the atmosphere even from the type soils without any -- any action; but mainly there's a concern that the volatiles will migrate down to the groundwater, and for that reason, it is necessary to take action where you have contaminated soils.

If you're going to use a system such as low-temperature thermal treatment, even on site, it is more of a problem than come of what they call in-situ measures, where you actually remediate without excavating. It is much preferred to use in-situ processes such as air sparging or vacuum extraction in order to avoid excavation.

If you excavate these petroleum-contaminated soils, you immediately have what is called airstripping, where the volatiles are released to the environment anyway.

Q. Have you reviewed the application submitted by Tri County in this case? * * *

Q. Such as it was. It was not very complete, but I did review it, yes sir.
Q. Why do you think it was not complete, sir?
A. Well, there are a number of such reasons. They mention, for example, that they have provided stack tests with their application. On further review, it appears that the stack test may be completely meaningless.

First of all, they were not conducted * * * at the Bryant Street site because there was no equipment there at all.

I also understand that they were sent to the Bryant Street site and stored on site.

Q. What was that, sir?
A. The contaminated soil sample that was going to be used for the stack test. My understanding is that they were sent to the site and remained on the site for a long period of time. This would be completely inappropriate for running any kind of a meaningful stack test.

First of all, it may or may not be representative of the types of soils they would be dealing with, but also, chances are it would be airstripped to the point of not giving a meaningful comparison of the problem. * * *

The airstripping of the contaminants in transportation and in handling again at the site, and in handling again when they are introduced to the thermal processing unit, the Midwest Institute has done studies where they have deliberately taken soil at a central treatment unit and spiked the soils with volatile organic compounds.

They have found that from the time they have spiked the soils until they finish loading



them into the feeder hoppers or conveyor belts for the treatment units, they have lost as much as 95 percent of the volatiles to the atmosphere. * * *

Q. When you refer to airstripping, what do you mean by that, sir?
A. The volatile compounds * * * evaporite [sic] from the soil.
Q. What is the effect of that?
A. Well, you're dealing with hazardous chemicals, xylene. toluene, benzene, all products of gasoline.

There are a total -- the American Petroleum Institute did studies on low-temperature thermal treatment. They * * * identified 59 listed hazardous constituents in petroleum refinery products, in addition to finding that low-temperature thermal treatment was completely ineffective in dealing with heavy metals.

These gasolines and other contaminants on UST sites contained about 12 or 13 very toxic, heavy metals, including lead, cadmium, and other constituents.

Low-temperature thermal treatment only aggravates the problem because the API found that the lead was being concentrated in the control equipment, in the bag houses.

The process that Gencor Thermotech uses * * * sends most of the soil directly from the drier to the cooler, where it becomes, quote, "clean soil" and is what they call product.

But also the dust and the gases that are driven off at the drier are routed to a bag house, and the dust is collected in the bag house, where it accumulates lead and other

heavy metals, and then it is returned to the so-called clean soil.

So you're actually accumulating products and then returning them to the so-called clean soil.

Q. Is there any danger of spontaneous combustion?

A. There is. * * * What I was getting on this was that my understanding was that at some sites, the Gencor equipment uses Cedar Rapids equipment for some of the things like the bag houses. Cedar Rapids * * * have stated that it is very dangerous if you allow the volatile gases to approach 25 percent of the lower explosion limit in these units; and there have, in fact, been fires and explosions in low-temperature thermal treatment plants. So that's a related worry. * * *

[DE 112, pp. 462-65 -- Cross-Examination]:

Q. Which DCRA officials that approved the permit in this case have you spoken with?

A. I have not spoken with anybody, to my knowledge. I said hello to Hampton Cross.

Q. You're aware that DCRA reviewed this project in terms of the environmental effects that could be expected; is that true?

A. That's true, sir. What I have stated when I submitted the expert testimony form was that I believe that they were -- they were handicapped by not having complete information in the application and that, indeed, they were correct in asking for more information. * * *



Q. Well, if they didn't have the necessary information, * * * isn't that their responsibility to go out and get it before they issue a permit?

A. I think that's a legal question. I do know that in Pennsylvania, we have very stringent requirements for obtaining permits for this type of work.

Every one of the applications that use Gencor equipment, and also several that use Tarmac equipment and Aztec equipment, every one that I'm aware of that -- every one that I worked on, which is more than a dozen in Pennsylvania, was rejected because of not meeting requirements for protecting the health, safety, and welfare.

Q. Uh-huh. In this particular case, you've indicated that the machine is not suitable for certain types of heavy metals; is that correct?

A. That's correct. sir.

Q. And if a company tests the soil before it brings it to this thermal desorption plant, it can evaluate whether or not it has the presence of heavy metals; is that correct?

A. It is theoretically possible to conduct the proper site analysis to determine the levels of total metals and the levels of different metals, yes. * * *

Q. * * * If you have a proper sampling, a sampling protocol being followed, you can be pretty confident in terms of the results of those samples; is that correct?

A. Usually the site investigations are determined before you decide on the method that you're going to use for remediation. * * * The reason for that is that low-temperature thermal treat-

ment is not the proper method to use even for on-site remediation, depending on the soil characteristics and the contaminants that are at issue; but when you go to the central thermal treatment of a great many different sites, the problem then becomes how does the treater, the remediator, ensure that the generators are not sending hazardous wastes to them.

In my experience, the protocols for determining at the treatment site whether or not the materials that are being received are, in fact, nonhazardous have left a lot to be desired. * * *

In Pennsylvania, we have questioned the people who say they are the treatment people and that they will ensure that no hazardous materials enter the processor. We have asked them simply, how do you do that. The protocols that are in effect usually say that you have to take a TCLP sample from six locations in a 500-ton pile of waste at a depth of six inches or a foot.

It is simply impossible, in my opinion, to have a proper testing at the site when you're taking four ounces of soil from a 500-ton sample.

**[DE 112, pp. 466-78 -- Colloquy: Court and Counsel]**:

MR. EMIG. As to the safety comment by Mr. Dishian, I think that was brought out during cross-examination. But the real problem I have with Mr. Siess' testimony, Your Honor, is Mr. Bolden's client has admitted in this case that it has done a full and complete review of



the effects of this project, and what we have with Mr. Siess is an environmental point of view saying, well, this could be a problem, this could be a problem, these aren't the best machines in the world.

Well, if there's a violation of the permit, I think that's speculation. If they start bringing any hazardous waste, they don't sample enough, that's a technical violation of their permit.

But I don't see really where he -- his evidence, testimony, goes on any of the issues in this case. In terms of mitigation, damages, or mootness, I don't think it really is specific to this -- the facts of this case.

He has not spoken with the regulators to know what they did. I'm just not sure there's relevance that would help the jury. It would just prejudice them to the extent of bringing in opposition to a project. * * *

THE COURT: * * * What is his testimony going to do by way of assisting the jury to understand the issues in the case? That's what expert witnesses are for.

MR. BOLDEN: Well, first of all, he's going to explain the process from our perspective. And he is going to show why a government should be concerned about that process and why additional information was necessary, and, in his view, why additional proceedings on this matter were necessitated.

Contrary to what counsel points out, Tri County had not completed the testing protocol; * * * they did not have the certificate of occupancy. So there were still considerable steps to

go before this was an up and running and operational business.

And we believe, we maintain that the District, given new evidence, given issues that indicated there had been some misrepresentations in applications, should have second look at this and either try to resolve them or go through the process to halt the project. That's essentially what our position is.

THE COURT: Let me just rehearse where we are here. On December 22, 1992, the administrator of the Department of Consumer and Regulatory Affairs Environmental Regulatory Administration advised Mr. Selzer that an environmental impact statement for the project would not be required pursuant to the conditions of the District of Columbia Environmental Policy Act of 1989.

The letter said that even though an environmental impact statement is not required, the project is still governed by all other applicable District and federal laws and regulations and will be subject to normal reviews during the permitting and construction processes; and it said that construction and operation of the facility would be governed by the special conditions included in approval number 3411 issued by the Air Resources Management Division on December 11.

Those special conditions, which are Plaintiff's Exhibit 3, approve the construction and operation of a 25-ton per hour portable soil remediation unit, including a rotary kiln, a bag house, and an afterburner, in accordance with



submitted plans and specs subject to 12 enumerated conditions.

Now the enumerated conditions include, by the way, that the approved facility would not be operated to treat hazardous waste materials, including but not limited to organic solvents, PCBs, PVCs, but would be permitted to process only soil contaminated with gasoline, diesel oil, fuel oil, or kerosene.

So all this business about heavy metals that Mr. Siess had to talk about seemed to be off the reservation.

Now, what I hear Mr. Siess saying, essentially, is that they shouldn't have issued this permit. Enlightened places like Pennsylvania and California don't do this. But he's not in Pennsylvania or California, he's in the District of Columbia; and they did do that. They did issue this.

Now, I'm sorry if my question to Mr. Selzer [sic] about what legal authority he had for asking his -- for writing his letter gave you an answer you didn't want to hear, but I haven't heard anybody say yet what authority the District had for reopening in that October 15 letter the questions that form the basis for the -- for your argument here really that when push came to shove, the District was going to jerk this -- this permit. That's your Carey versus Piphus thing.

But unless the District of Columbia acted ultra vires, I haven't yet been shown how they could have reversed course on this process, having granted the -- having granted a permit on December 11, having waived the air quality

control on December 22, having issued a building permit.

Now I will grant you the possibility that a full-scale legal proceeding, perhaps one even brought by the community requiring some -- or demanding some reevaluation of this process, raising questions like the question Mr. Siess is bringing here, ventilating the objections of the community to dump trucks driving past children's parks, raising the specter, as you tried to do in your cross-examination, that who knows whether the truckers would put those tarps on the trucks when they really come through or not -- I would grant you that the proceeding of that kind might have had the effect of pulling this permit.

After-acquired evidence, a proceeding for fraud in saying it wasn't going to have much vehicular traffic, just a few employees; a proceeding for fraud; you told us there weren't going to be any houses within 700 feet. Look at all these houses; all that might have happened. But it didn't happen. * * *

I am going to hold that Mr. Siess' testimony is -- let me just review it. He was going to say that this process is not suited for some sites, but that's not the issue we're dealing with here, because we're dealing with dirt that is already going to be brought from other sites.

He's going to say treatment should be on site. Well, maybe it should, but this treatment plan was approved for the District of Columbia -- by the way, his testimony is not time limited, so you don't have any idea whether he's talking about 1993 or 1998, and that may make a



difference on whether in-situ treatment is more de rigueur today than it was in 1993.

I notice one of your experts -- I think it was DiRenzo -- had in his report something about this new biological process for eating up the little petroleum things. Well, I can remember from my days in private practice, they were just beginning to talk about using these enzymatic ways of doing third-stage recovery from oil wells and that sort of thing, and that's fairly new. I don't know if they were doing it in 1993.

He said the stack tests were meaningless because they were not conducted at Bryant. Well, the conditions of the grant, of the operating permit, were that there be stack tests conducted at Bryant. So that doesn't help us any.

Soil -- the soil samples would be airstripped as they were taken out of the hole. Well, that doesn't affect the neighborhood -- or airstripped by transit -- that doesn't affect the neighborhood, except in the last couple of blocks.

Airstripped by being handled inside the building? Well, you have Sweeney saying whatever is in the building is okay. He says waste handling is a problem if you send it to central treatment plants.

I guess that's what I've been talking about. He talks about heavy metals, xylene, toluene, benzene. I guess those are all constituent molecules of the basic gasoline that we're talking about, but they have covered -- as for the spontaneous combustion, that's a -- I don't

mean to diminish Mr. Siess' testimony, but that's an imaginary horrible.

I'm going to find that his testimony is wholly irrelevant. * * *

I'll tell you where it goes from there, Mr. Bolden. I think it segues into a ruling * * * that I am not going to permit the jury to find that the District of Columbia would * * * ultimately have denied the permit for this building to go forward, because I don't think there's any other basis for it.

Now, that does not take * * * out of the case the citation, stop work order, failure to pay the fine, failure to answer question, which I think of as analytically separate from this -- the public health and safety question.

But I think there is no evidentiary basis on which this jury can determine that -- that is, there is no proper evidentiary basis -- and I'm not going to let Siess -- Siess' testimony would not add to it -- no proper evidentiary basis on which this jury could find that in a Carey versus Piphus kind of finding that the District would have ultimately refused permission to go ahead with this project. * * *

MR. EMIG: I'm going to just put Mr. Selzer on for five minutes, Your Honor.

THE COURT: What's he going to say? What's he going to rebut?

MR. EMIG: He's going to rebut the access on Bryant Street and also the issue of the covered trucks.

MR. BOLDEN: Sorry, what was that?

THE COURT: Covered trucks.



MR. EMIG: The dump trucks being covered. I think there was testimony by Mr. Sweeney on that.

THE COURT: Well, if I'm ruling that issue out, what's the point of any of that rebuttal?

MR. EMIG: That's correct. Then in that case 'cause * * * the second question I would have, then, would relate to the October 15 letter, and also the follow-up to the December 6 letter of 1993, because Mr. Cross in the December 6, 1993 letter says, I'm going to suspend or I'm going to revoke because, A, you didn't respond to the October 15 letter, and secondly, because of likely significant environmental impacts.

I'm not -- that's really a prejudicial statement. He has no basis for it, and I don't think counsel should be able to argue that as a basis -- either of those as a basis for suspension.

THE COURT: I agree with that. What do you want to do with the exhibits?

MR. EMIG: I'd have it stricken and submit it to the jury. Page 2. * * *

THE COURT: * * * I'm going to grant the motion to strike the October 15 and the December 6 letters. I'm going to tell the jury that -- I don't know exactly -- basically. I'm going to tell the jury that the health and safety questions are out of this case and not to be determined by them * * *.

I'm still undecided as to what my ultimate decision is on the lost future profit question. But at this moment, I'm disposed to let the jury decide it in the first instance.

**[DE 114, p. 493: Colloquy: Court and Counsel]:**

> MR. BOLDEN: * * * And bear in mind that this case is not a traditional compensatory damage case. Mr. Emig filed that in Superior Court. That was dismissed.
>
> This is a civil rights case, and it is a procedural due process case, so it is a horse of a different color from cases in which someone is injured and they go to damages.

**[DE 114, pp. 496-99 -- Defendants' renewal of their motion for judgment as a matter of law]:**

> MR. BOLDEN: * * * Your Honor, I would like to renew the motions that the District made at the close of plaintiff's case concerning mitigation of damages and the issue going to future profits. I will not argue it again, as the Court has appeared to have ruled.
>
> I would like to raise one other area which I believe necessitates the dismissal of aspects of the plaintiff's damage claim.
>
> As the facts have shown on September 20, 1993, there was an oral suspension, a verbal suspension of the permit of Tri County to build. Subsequently, on September 22, there was issued a stop work order, a valid stop work order which wasn't challenged in any way. It had all the force and effect of the laws of the District of Columbia behind it.
>
> On October 25 there was an order issued by the Office of Adjudication of the District of Columbia which suspended by operation of law



> Tri County's permit to build and had all the force of laws of the District of Columbia.
>
> Your Honor, none of these orders are disturbed. They remain in place to this very day. It is the District's position that, as a matter of law, Tri County is entitled to no more than damages that flowed from the * * * September 20 suspension, which has been determined by the Courts to be invalid to September 22, which is the date of the stop work order. That stop work order cleared the deck of any damages that Tri County is entitled to; but even if the Court determines that the September 22 stop work order did not clear the deck, clearly, the order issued by the Office of Adjudication on September [sic] 25 cleared the deck of any damages that Tri County would be entitled to. * * *
>
> THE COURT: Well, Mr. Bolden, I hear that argument. It is -- I have to say -- a strong argument. It may be an argument that will persuade the jury that by some -- either on a mitigation theory or on your version of the mitigation theory, which is the Carey versus Piphus theory, this thing would never have been built anyway, that they should not award more than nominal damages.
>
> * * * [I]f the jury returns a verdict in favor of plaintiff in a substantial amount of money, I'm going to have to reconsider your argument as I have, of course, the option to do under Rule 50 and determine whether a reasonable jury could have found what they found.
>
> I'm going to abide that event and see what the jury says.

**[DE 114, pp. 500-01. Court directives to jury.]:**

Now, before we begin the arguments of counsel, I want to tell you about some of the evidence you've heard which I have now stricken from the record and you are not to consider it. It is a little hard to unring bells, as they say, or unscramble eggs, but you are going to be instructed not to consider several items that * * * you have heard about.

They all involve what I will call the health and safety aspects of this project.

I have stricken from the record Defendant's Exhibits 8 and 9.

(Defendant's Exhibits Nos. 8 and 9 were stricken.)

THE COURT: Those are the two letters from the District of Columbia government to Tri County, October 15 and December 6, 1993, asking for follow-up information and informing them that they would be suspended if they didn't give that information.

I have also stricken some of the testimony you've heard. The testimony of Mr. Sweeney that you heard yesterday about the fact that there were houses 50 to 75 feet away; the testimony of Mr. Sweeney about truck traffic and the noise of truck traffic; the testimony of Mr. Sweeney about his concern that if the trucks came through without covers on them, there would be volatized chemicals; and there was also testimony in the plaintiff's case on that general subject.

You remember Mr. Dishian who testified that this soil contaminated with petroleum



products was no more dangerous than pumping gas? I'm striking that testimony.

There was testimony from several witnesses, Mr. Selzer -- Mr. Selzer right here -- Hampton Cross, and Mr. Sweeney, all testified about whether a transportation plan had been handed to Mr. Cross. That testimony is stricken.

So, ladies and gentlemen, in effect, all * * * of the testimony before you on the health and safety aspects of this project have been stricken from the record because I have determined after hearing all the testimony, as a matter of law, that the permitting process fully considered those issues and resolved them.

So you are not to consider the health and safety issues that have been raised in this case.

## JURY INSTRUCTIONS -- EXCERPTS

[DE 114, pp. 539-542]:

On the first question, the law requires that an injured party take all the reasonable steps it can to avoid further injury and reduce its loss. Tri County may not recover damages for any portion of its injury which it could have avoided through the exercise of reasonable care and prudence.

In determining whether plaintiff's conduct was reasonable, you may take into account the evidence concerning the circumstances as they reasonably appeared to Tri County at the time.

The District asserts that Tri County, by failing to pay the $500 fine assessed against it and by failing to appeal the stop work order, is not entitled to any damages.

The burden of proof on this question is on the District of Columbia. If the District of Columbia has not proven by

a preponderance of the evidence that Tri County acted unreasonably in failing to pay the fine or take the appeal, and that the failure to take those specific steps resulted in greater losses than would have been the case if Tri County had paid the fine or taken the appeal, then the District of Columbia has not sustained its burden of proof on this issue, and you must go on to determine the amount of damages that will fairly compensate Tri County for all of its damages to its business or property that were proximately caused by the District of Columbia's conduct. * * *

The law provides that the plaintiff is to be fairly compensated for all damages, if any, to its business or property that were proximately caused by the defendant's conduct.

In this case, the plaintiff has provided detailed evidence of damage amounts, but it is not necessary that the precise amount of plaintiff's damages be proven, particularly if the defendant's wrongdoings have caused any difficulty in determining the precise amount.

You are not bound to accept the figures presented to you, but neither should you speculate in any way about what the damages might have been.

Your evidence must be based on the evidence presented to you and not on guesswork. Your award, if any, should be one that fairly compensates the plaintiff for the damage proximately caused by the District's unlawful suspension of the building permit.

That brings us to the third question you are to determine, which is whether you find that the plaintiff has proven by a preponderance of the evidence that the plaintiff's damages should include lost profits from the business that was planned for the Bryant Street property. And if so, how much those profits would have been.

If you find that because of defendant's wrongful conduct the plaintiff was unable to earn net profits which



would have accrued to it but for the violation, then you may compensate the plaintiff for that loss.

Future profits means net profits. Future profits are determined by subtracting the costs and expenses of a business from its gross revenues. In determining whether or not to award plaintiff damages that include future profits, you may consider the uncertainty which makes the success of a new business problematical, the experience or inexperience of the plaintiff's management in the business it proposed to do, the competition that plaintiff would have had in the relevant geographical area, the success or failure of other like businesses, and any other evidence in the case that in your view bears on the issue.

You may make an award for lost profits only if you find that there is some reasonable basis in the evidence for determining that the plaintiff has, in fact, suffered a loss of profits. You are not to award the plaintiff speculative damages; that is, compensation for future profits which although possible are remote or guesswork.

On the other hand, it is not necessary that the plaintiff shall have proven to an absolute certainty that it would earn profits and how much they would be. It is sufficient if the plaintiff shows by a preponderance of the evidence and to your satisfaction the amount of its lost profits.

**[Plaintiff's Exhibit 3]:**

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
ENVIRONMENTAL REGULATION ADMINISTRATION
2100 MARTIN LUTHER KING, JR. AVENUE, S.E.
WASHINGTON, D.C. 20020-5732

* * *

December 11, 1992

Glenn D. Selzer, President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Maryland 20705

**Approval No. 3411**

Pursuant to the requirements of Title 20 of the District of Columbia Municipal Regulations (20 DCMR), Subtitle 1, Section 200, approval is hereby granted for the construction and operation of a 25 tons per hour portable soil remediation unit, Model 625/825, including a rotary kiln, a cyclone, a baghouse and an afterburner at 2115 Bryant Street, N.E. in accordance with submitted plans and specifications.

This approval is issued subject to the following conditions:

1. This approval is not valid unless attached to Form BLRA-33, Application for Permits to Construct on Private Property, for the purpose of obtaining a construction permit and until this office receives a copy of the permit issued on the basis of this approval.



2. The approved facility shall be operated solely for testing until the test results demonstrate compliance with applicable requirements of 20 DCMR and thereafter, it shall be operated in accordance with applicable requirements of 20 DCMR and the following permit conditions.

3. There shall not be scheduled any stack emissions testing until this office receives and approves a test protocol.

4. A test report that includes gas flow rates (SCFM), effluent gas particulate loading (gr/dscf), effluent temperature (°F), and supported with laboratory analysis of the effluent gas that shows concentration of volatile organic compounds in milligrams per cubic meter shall be submitted to this office within 48 hours after the test is completed.

5. Representatives of the Environmental Regulation Administration, at any reasonable time, may inspect the facility during and after construction is completed.

6. There shall be no fugitive dust emissions and particulate grain loading shall not exceed three hundredths (0.03) grains per dry standard cubic feet.

7. The total emissions of volatile organic compounds (VOCs) in the afterburner effluent shall be limited to one (1) pound per day.

8. The baghouse shall be operated and maintained as per manufacturer's recommendations and a minimum of 24 extra bags shall be maintained on site for emergencies.

9. The record that includes, but not limited to, operating parameters, baghouse maintenance record, numbers of bags used and on hand, and total tonnage of soil treated shall be kept daily and be made available for inspection when requested.

10. The approved facility shall not be operated to treat hazardous waste materials which include, but not limited to, organic solvents, polychlorinated biphenyls (PCB) polyvinyl chlorides (PVC) but permitted to process only soil contaminated with gasoline, diesel oil, fuel oil or kerosene.

11. Any changes or alterations in the operation of the soil remediation unit must be reported to this office immediately by phone and followed by a letter within five (5) working days stating the reasons.

12. Any violations of applicable air pollution control requirements of 20 DCMR or conditions of permit approval must be reported to this office immediately by phone and followed by a letter within five (5) calendar days describing the nature and duration of the violation, and measures to be taken to prevent future occurrences.



Should there be any questions, please call or write to this office.

Sincerely,
*/s/ Modupe A. Babalola*
Modupe A. Babalola
Environmental Engineer
Air Resources Management Division
2100 M.L. King, Jr. Avenue, S.E.
Suite #203
Washington, D.C. 20020
Telephone: (202) 404-1180
Fax: (202) 404-1188

**[Plaintiff's Exhibit 4]:**

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
ENVIRONMENTAL REGULATION ADMINISTRATION
2100 MARTIN LUTHER KING, JR. AVENUE, S.E.
WASHINGTON, D.C. 20020-5732

* * *

Dec 22 1992

Glenn D. Selzer
President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Md. 20705

Dear Mr. Selzer:

We have completed our review of the Environmental Impact Screening Form submitted to this office on April 15, 1991, concerning the proposed development of a soil remediation facility at 1911 New York Avenue, N.E., Washington, D.C. This EISF, along with stack test reports, an application for approval to construct and operate a source of air pollution, and other information were used to review the environmental impacts of your current proposed action, now proposed to be constructed at 2115 Bryant Street, N.E., Washington, D.C.

Based on a finding of no significant environmental impact, we have determined that an Environmental Impact Statement for this project will not be required pursuant to the conditions of the District of Columbia Environmental Policy Act of 1989.

Please be advised that even though an Environmental Impact Statement is not required, your project is still governed by all



other applicable District and Federal laws and regulations and will be subject to normal reviews during the permitting and construction processes. Also, construction and operation of the facility will be governed by the special conditions included in Approval No. 3411, issued by the Air Resources Management Division of this Administration on December 11, 1992.

Thank you for your patience during this review process and for your future cooperation. If you have any questions, please contact Mr. James Sweeney, EIS Coordinator, on (202) 404-1136.

Sincerely,

/s/
Ferial S. Bishop
Administrator

cc: Hampton Cross, Administrator, BLRA
Armando Lourenco, PPD

**[Plaintiff's Exhibit 44]:**

**BRYANT STREET FACILITY**
**SUMMARY OF EXPENDITURES**

| | | | |
|---|---|---|---|
| 1. | New Partnership -- | | $123,800.96 |
| | less rent received | | (1,800.00) |
| 2. | Engineering System Consultants, Inc. | | 80,275.36 |
| 3. | Anthony Velazquez, Architect | | 14,138.90 |
| 4. | Wilkes, Artis, Hedrick & Lane, Attorneys | | 27,684.31 |
| 5. | D.C. Treasurer - Permit | | 2,643.00 |
| 6. | General Home Company | | 47,323.34 |
| 7. | Bernard Locraft, Civil Engineer | | 1,500.00 |
| 8. | Va. Sprinkler Co., Inc. | | 750.00 |
| 9. | Bayscale Northern Va. | | 22,720.00 |
| 10. | A.W. Stevens | | 1,128.28 |
| 11. | Pepco | | 6,451.97 |
| 12. | Geotrack | | 260.00 |
| 13. | T.A. Bennett Trucking | | 68,065.00 |
| 14. | TSC Transport | | 8,617.50 |
| 15. | Evered Bardon Mid Atlantic | | 68,089.05 |
| 16. | AR Tool & Equipment | | 1,652.39 |
| 17. | Tri County Industries | | |
| | a) labor | $10,250.41 | |
| | b) fringe benefits | 2,875.12 | |
| | c) corporate overhead (25%) | 2,562.60 | 15,691.13 |
| 18. | Tri County Industries - officers | | |
| | a) Glenn Selzer | $31,000.00 | |
| | b) fringe benefits | 8,680.00 | |
| | c) corporate overhead | 7,750.00 | 47,430,.00 |
| | **TOTAL (Entire Project)** | | **$536,421.19** |



**[Plaintiff's Exhibit 54; D.E. 17 -- Exhibit A]:**

**APEX**
environmental, inc.

15850 Crabbs Branch Way
Suite 300
Rockville, MD 20855
Telephone (301) 417-0200
*Facsimile (301) 975-0169*

March 24, 1995

Mr. Frank Emig
7525 Greenway Center Drive
Suite 315
Greenbelt, Maryland 20770

Dear Mr. Emig:

At your request, Apex Environmental, Inc. (APEX) has completed a survey of the Washington, D.C. area market for the low-temperature thermal treatment of petroleum contaminated soils. The purpose of the survey was to establish a baseline for the area with regard to the total tonnage of the soils treated and the gate price per ton for disposal. The baseline was to be established for 1992 through 1994 and projected through the year 2000. The following sections detail the procedures used and the results of this survey.

**Survey Procedures**

Apex developed a survey questionnaire for distribution to facilities that have accepted petroleum contaminated soils for thermal treatment. Apex mailed the survey questionnaire to facilities that accepted soil from the Washington, D.C. area over the time period in the survey. * * * For the area of the survey, Apex divided the responding facilities into regional

groups. The separate regions were assigned based on proximity to the Washington D.C. area and the actual involvement of the facilities within the Washington metropolitan thermal treatment market. Region 1 includes Virginia facilities located in Richmond or further north. This region was represented by three facilities for most of the survey time and had extensive involvement in the Washington market. Region 2 includes facilities located in Maryland and includes two facilities that had extensive involvement in the market. Region 3 includes Virginia south of Richmond and North Carolina. The survey includes responses from three facilities which had relatively little involvement in the Washington, D.C. market.

As will be seen from the survey results, Region 1 facilities contributed the largest volume of treated soil to the results. This occurred based on the specific regulations in Virginia and Washington, D.C. which were more strict than those in Maryland with regards to the amount of contaminated soil to be excavated. The Virginia and Washington D.C. regulatory communities required, much more often than the Maryland regulators, the excavation and treatment of contaminated soil. Additionally, Virginia has a much more accessible reimbursement program whereby responsible parties who incur costs for the cleanup of their property can, with the state's agreement, obtain reimbursement from the state for a large portion of their costs. These factors combined to produce a market that was dominated by contaminated soils excavated within Virginia and Washington, D.C.

**Survey Results * * ***

Region 1

This region represents the most active region for the disposal of petroleum contaminated soils from the Washington, D.C. market. For most of the survey period, this region included three facilities. Transportation costs for this region ranged from a low value of $6.00 per ton to $12.00 per ton for the facility located farthest from the market.



| Year | * * * | Total Tonnage All Facilities | * * * | Average Cost Per Ton ($) |
|---|---|---|---|---|
| 1992 | * * * | 217,500-297,500 | * * * | 42.68-55.33 |
| 1993 | * * * | 303,099-383,099 | * * * | 37.83-50.50 |
| 1994 | * * * | 160,000-250,000 | * * * | 31.00-47.00 |
| | | Projected | | |
| 1995 | * * * | 300,000 | * * * | 34.00-45.00 |
| 1996 | * * * | 300,000 | * * * | 34.00-45.00 |
| 1997 | * * * | 400,000 | * * * | 34.00-45.00 |
| 1998 | * * * | 450,000 | * * * | 34.00-45.00 |
| 1999 | * * * | 300,000 | * * * | 34.00-45.00 |
| 2000 | * * * | 300,000 | * * * | 34.00-45.00 |

Region 2

This region includes responding facilities located in Maryland and represents the second largest provider of services to the Washington, D.C. market. Apex is aware of one facility in the region which has been active in the market but did not respond. The region included two responding facilities for the term of the survey. Transportation costs for the two facilities that responded to the survey ranged from $6.00 to $11.00.

| Year | | Total Tonnage All Facilities | | Average Cost Per Ton ($) |
|---|---|---|---|---|
| 1992 | * * * | 93,616 | * * * | 38.50-58.50 |
| 1993 | * * * | 94,491 | * * * | 34.00-54.00 |
| 1994 | * * * | 91,950 | * * * | 44.00-54.00 |
| | | Projected | | |
| 1995 | * * * | 90,000 | * * * | 34.00-44.00 |
| 1996 | * * * | 90,000 | * * * | 34.00-44.00 |
| 1997 | * * * | 120,000 | * * * | 34.00-44.00 |
| 1998 | * * * | 120,000 | * * * | 34.00-44.00 |
| 1999 | * * * | 90,000 | * * * | 34.00-44.00 |
| 2000 | * * * | 90,000 | * * * | 34.00-44.00 |

* * *

Projection

The market has undergone significant change over the past three years. While tonnages for regions have remained relatively constant, the treatment totals for various facilities have fluctuated. In 1994 the market saw an increase in the number of facilities, both existing and new, that provided bioremediation of petroleum contaminated soil as opposed to thermal treatment. This process involves the application of microorganisms and fertilizers to contaminated soil stockpiled at permitted facilities. The active microorganisms break down the petroleum hydrocarbons in the soils to reduce the contaminant levels. Additionally, some of the regions have seen an influx of facilities that provide "cold batch" treatment of contaminated media. This process involves cold mixing of contaminated soils into cold batch asphalt. This process does not destroy the contaminants, merely immobilizes them within an asphalt mixture. Both of these processes are expected to



remain active within the market place but are not expected to significantly reduce the tonnage of soil treated through thermal methods.

Total tonnage projections reflect in [sic] increase between 1997 and 1998. This increase is anticipated to occur as a direct result of the requirement for most existing USTs to be upgraded or replaced by December 22, 1998. There is anticipated to be a large number of USTs that will be so affected. Coupled with the increased level of UST work in the market place should be a commensurate increase in the amount of petroleum contaminated soil required for disposal.

Price structures are projected to remain stable throughout the time frame. This is based on the observation that soil prices have dropped to the lowest point to allow for the facilities to cover operating costs. In fact, one facility located in Region 2 attempted to gain a larger portion of the market by reducing gate prices below cost. The result was that the facility had to be sold at a loss to its lenders, as it could no longer make payment on incurred debt.

**Summary and Conclusions**

Apex's past experience and the results of this survey indicate a strong market place for thermal treatment of petroleum contaminated soils. The market tonnages have been stable over the survey period and are projected to remain stable or increase slightly. Cost structures for gate prices per ton have fallen slightly over the survey period, but are projected to have reached bottom based on Apex's experience and our survey results.

Overall, it is Apex's opinion that the projected tonnage and cost values are conservative. The market for the thermal

treatment of contaminated soil is fairly stable. If a facility had been able to operate a thermal treatment unit within Washington, D.C. during the time frame of the survey, it would have been very well placed to have captured a significant portion of the market. The proximity of the facility with respect to the sites where contaminated soils were being excavated would have been much better than all of the responding facilities. Additionally, a facility in Washington, D.C. would have much reduced transportation costs as opposed to the other facilities. In fact, transportation costs would have been approximately $2.00 to $3.00 per ton. This figure would give the Washington facility an advantage over the other regional facilities and would allow the Washington facility to charge a higher gate price while remaining cost competitive. As such, it is Apex's opinion that the facility in Washington could have charged $4.00 to $7.00 more at the gate than its competition and remain cost competitive. Therefore, for the time frame of the study, a facility located in Washington could have charged $32.00 to $40.00 per ton at the gate for contaminated soil.

Apex is pleased to have had the opportunity to perform these services. If you have any questions or comments, please call.

Sincerely,
*/s/ Vincent N. DiRenzo, Jr.*
Vincent N. DiRenzo, Jr.
Director, Environmental Services

**EDITOR'S NOTE**

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 644 P06

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## TRI COUNTY DAMAGE SPREADSHEET

*This appendix accompanies my text report. If new testimony emerges near and during trial, these calculations may be modified.*

***This analysis assumes that trial will occur in January 1998.***

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|
| REVENUES | $3,367,500 | $3,202,500 | $2,955,000 | $2,707,500 | $2,707,500 | $2,707,500 | $2,707,500 |
| LESS COSTS | $1,335,908 | $1,250,097 | $1,260,180 | $1,270,514 | $1,293,557 | $1,317,176 | $1,341,386 |
| EQUALS NET PRE-TAX INCOME (Each Year) | $2,031,592 | $1,952,403 | $1,694,820 | $1,436,986 | $1,413,943 | $1,390,324 | $1,366,114 |
| Pres Value of Income Each Year) | $2,469,413 | $2,260,150 | $1,868,539 | $1,508,835 | $1,413,943 | $1,158,603 | $948,690 |
| **CUMULATIVE TOTALS (I.e., Damage Estimates)** | | | | | | | |
| Not discounted to Present Value | $2,031,592 | $3,983,995 | $5,678,815 | $7,115,801 | $8,529,744 | $9,920,067 | $11,288,182 |
| Discounted to Present Value | $2,469,413 | $4,729,563 | $6,598,102 | $8,106,937 | $9,520,880 | $10,679,483 | $11,628,174 |

**Discount rate**

20% For future lost profits (1998-2000)

5% Interest for delayed receipt of funds(1994 through 1997)



[Plaintiff's Exhibit 56]:

Revenues

| Revenues : | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|
| 75,000 tons of soil | $3,000,000 | $2,850,000 | $2,625,000 | $2,400,000 | $2,400,000 | $2,400,000 | $2,400,000 |
| 7,500 tons | $277,500 | $262,500 | $240,000 | $217,500 | $217,500 | $217,500 | $217,500 |
| 45,000 tons cl soil | $90,000 | $90,000 | $90,000 | $90,000 | $90,000 | $90,000 | $90,000 |
| TOTAL REVENUES | $3,367,500 | $3,202,500 | $2,955,000 | $2,707,500 | $2,707,500 | $2,707,500 | $2,707,500 |

NO. 644 P07
10/31/97 01:39 JOEL N MORSE - 301 345 0975

Costs

**Costs (inflation is assumed to be 5% for costs):**

| | | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|---|
| 1 | Plant Operator/Supervisor | $50,000 | $51,250 | $52,531 | $53,845 | $55,191 | $56,570 | $57,985 |
| 2 | Assistant Supervisor | $30,000 | $30,750 | $31,519 | $32,307 | $33,114 | $33,942 | $34,791 |
| 3 | Laborers(2@$7.00/hr) | $29,120 | $29,848 | $30,594 | $31,359 | $32,143 | $32,947 | $33,770 |
| 4 | Loader/Operator | $49,920 | $51,168 | $52,447 | $53,758 | $55,102 | $56,480 | $57,892 |
| 5 | Fringe Benefits(28.05%) | $44,611 | $45,726 | $46,869 | $48,041 | $49,242 | $50,473 | $51,735 |
| 6 | Utilities | $584,854 | $498,007 | $498,007 | $498,007 | $510,457 | $523,219 | $536,299 |
| 7 | Equipment Repairs | $18,000 | $18,460 | $18,911 | $19,384 | $19,869 | $20,365 | $20,874 |
| 8 | Corp Overhead | $31,808 | $32,603 | $33,418 | $34,254 | $35,110 | $35,988 | $36,888 |
| 9 | Equipment (SRU) | $139,915 | $139,915 | $139,915 | $139,915 | $139,915 | $139,915 | $139,915 |
| 10 | Land -Capital Costs | $174,000 | $165,200 | $165,200 | $165,200 | $165,200 | $165,200 | $165,200 |
| 11 | Real Estate Taxes | $22,000 | $22,550 | $23,114 | $23,692 | $24,284 | $24,891 | $25,513 |
| 12 | Personal Property Taxes | $22,000 | $22,550 | $23,114 | $23,692 | $24,284 | $24,891 | $25,513 |
| 13 | Insurance | $13,500 | $13,838 | $14,183 | $14,538 | $14,901 | $15,274 | $15,656 |
| 14 | Trucking to facility | $82,500 | $84,563 | $86,677 | $88,843 | $91,065 | $93,341 | $95,675 |
| 15 | Lab Tests(312x4x$35) | $43,680 | $43,680 | $43,680 | $43,680 | $43,680 | $43,680 | $43,680 |
| TOTAL COSTS | | $1,335,908 | $1,250,097 | $1,260,180 | $1,270,514 | $1,293,557 | $1,317,176 | $1,341,386 |

| SRU Cost | Interest Rate-SRU |
|---|---|
| $600,000 | 14.00% |
| **Land Cost** | **Interest Rate-Land** |
| $1,400,000 | 11.80% |

(SRU means "soil remediation unit")

| | |
|---|---|
| INFLATION ASSUMPTION= | 2.50% |
| INFLATION MULTIPLIER= | 1.025 |

10/31/97 01:39 JOEL N MORSE → 301 345 0975 NO. 644 P08

10/31/97 01:48 JOEL N MORSE → 301 345 0975 NO. 644 009

**Note:** 2 at $12/hr.

**Note:** Gas, electric and water

**Note:** The costs for utilities are based on the report of Carter Engineering, Inc. Installation costs are $86,846 (one time only). I use $584,854 for 1994 . In 1995 through 1997, I use, per Carter, in $498,007.

**Note:** 20% of Items 1-4

**Note:** I believe that my analysis is conservative, because I have assumed a zero salvage value for the SRU. If salvage value were higher than zero, there would be a positive residual at the end of the planning horizon,which would reduce costs.

**Note:** I have assumed lease payments of 12 months at $14,500 for 1994.

**Note:** I have assumed that (in the beginning of 1995) the land on Bryant St. was purchased for the amount in cell B26. I have assumed that it was sold for the same price, in real terms, at the end of the year 2000. I have charged, as a cost, 11.8% interest.

**Note:** I assume that the land is purchased in 1995, and sold at the end of 2000. No profit or loss is assumed on the land transaction.

**[Plaintiff's Exhibit 57]:**

# THE NEW PARTNERSHIP

August 17, 1993

Mr. Glen Selzer
Tri-County
P.O. Box 1467
Baltimore, Maryland 20705

Subject: Tax Bill for 2115 Bryant Street

Dear Glen:

Enclosed is the tax bill for 2115 Bryant Street for one-half year. This bill must be paid by September 15, 1993 to avoid penalties.

| | | |
|---|---|---|
| Lot 001S | 648.06 | 648.06 |
| Lot 0007 | 379.00 | 649.00 |
| Lot 0016 | 340.93 | 340.93 |
| Lot 0805 | 308.90 | 308.90 |
| Lot 0078 | 10,487.75* | 8,692.27* |
| | | 10,369.96 |

*27,857 square feet not leased to Tri-County

600 square feet x 27.837 = 167,022
167,022/ 2.15 = 3,590.97
3,590.97/ 1/2 year = 1,795.48

10,487.75
-1,795.48
$8,692.27

Please send me a check for $10,369.96.

Thank you.

/s/ *Walter M. Prichard*
Walter M. Prichard
General Partner
The New Partnership

WMP/dmp
Enclosures

5300 BEECH PLACE, TEMPLE HILLS, MD 20748
(301) 422-1900



**[Defendants' Exhibit 8]:**

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
ENVIRONMENTAL REGULATION ADMINISTRATION
2100 MARTIN LUTHER KING, JR. AVENUE, S.E.
WASHINGTON, D.C. 20020-5732

* * *

15 OCT 1993

Mr. Glenn D. Selzer
President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Maryland 20705

Dear Mr. Selzer:

As you are well aware, at a community meeting held at the Washington Center for Aging Services, at 2601 18th Street, N.E., Washington, D.C., on Monday, September 20, 1993, Mr. Hampton Cross, Acting Director of the Department of Consumer and Regulatory Affairs, stated that he was suspending the permit for construction of Tri-County's proposed soil remediation facility at 2115 Bryant Street, N.E. Mr. Cross's statement was based on new information which was brought to light at the meeting concerning the ultimate use of property which is adjacent to your site. This property has been proposed for a low-to-moderate income housing project by the D.C. Department of Housing and Community Development.

In light of this new information, we have determined that further review is necessary in order to determine what the potential environmental impacts from your proposed facility on the adjacent property will be. Therefore, pursuant to

Section 4(c)(3)(C) of the District of Columbia Environmental Policy Act of 1989, you are directed to supply the following information:

1. The total cost of your proposed project, including the costs of the soil remediation equipment to be installed, the costs of construction materials and labor costs for both construction and installation of equipment;

2. The expected amount of soils in tons, both maximum and average, to be processed per day at the facility;

3. The number of truck trips into and out of the facility per day, for both maximum and average loads;

4. The proposed routes of trucks through the neighborhood into and out of the facility;

5. The proposed hours of operation of the facility;

6. Current conditions of the facility property regarding pest infestation (rodent and insect), dust and odor;

7. Contingency plans, if any, for the control of pests, dust and odor;

8. Proposed means of the washing of the facility and methods for disposing of wash water and cleaning materials;



8. The distance of the facility from the adjacent property proposed for development. This distance should be measured from your property line to the property line of the adjacent property; from truck entrances and exits to the adjacent property line; and from the smokestack of soil remediation equipment to the adjacent property line;

9. The distance of the facility from other currently occupied properties near the facility, both industrial and residential. These distances should also be measured as in No. 8 above; and

10. Any information on alternative sites which might be suitable for your proposed facility.

Thank you for your timely submittal of this information. If you have any questions, please contact me on 202-404-1136.

Sincerely,

*Donald E. Wamsgans II*
*for* Ferial S. Bishop
Administrator

cc: Hampton Cross, Acting Director, DCRA

[Defendants' Exhibit 9]:

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE DIRECTOR

* * *

DEC 6 1993

Mr. Glenn D. Selzer
President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Maryland 20705

Dear Mr. Selzer:

This is to inform you that the Department of Consumer and Regulatory Affairs has rescinded its original environmental approval, dated December 22, 1992, for the proposed Tri-County Industries soil remediation facility at 2115 Bryant Street, N.E., Washington, D.C.

By letter, dated October 15, 1993, you were directed to provide certain specific information, pursuant to Section 4(c)(3)(c) of the District of Columbia Environmental Policy Act, concerning the potential environmental impacts of your posed [sic] project on a proposed low-to-moderate income housing project sponsored by the District's Department of Housing and Community Development (DHCD). As of this date, you have not responded to this directive.

Section 4(c)(3)(c) requires that an applicant provide to the District, at any time during the review process, all relevant information concerning the impact, costs, benefits and alternatives to the project, in order to assist in determining the



environmental impacts of the project if the information has not been submitted in a timely manner. Your failure to respond to the October 15, 1993 letter constitutes grounds for disapproval of the project.

Furthermore, the original environmental approval was based on information provided by you on the Environmental Impact Screening Form stating that your facility would be over 700 feet from the nearest residential house. You failed to bring to our attention the fact that there is a single family residence directly across the street from your facility, less than 100 feet away. We are concerned that this home, as well as the proposed DHCD housing project, are much too close to your facility to not be impacted by the emissions from the treatment process and potential emissions from contaminated soil stored at the facility or transported through the neighborhood.

Since it is the mission of this department to protect the health, safety and welfare of the citizens of the District of Columbia, environmental approval for your proposed project is hereby denied based on your failure to respond to our October 15, 1993 directive letter and on likely significant adverse environmental impacts on nearby homes.

Because the environmental approval was one of the criteria for the issuance of the work permit for the construction and alteration at 2115 Bryant Street, N.E., the Acting Administrator of the Building and Land Regulation Administration will be sending you a Notice of Intent to Revoke Permit, with the requisite charges and specifications and hearing procedures. That Notice will be served on you by Friday, December 10, 1993.

Also, you are directed to remove <u>immediately</u> and to dispose of properly, the contaminated soil which is currently stored

inside your facility. The presence of the soil on the site constitutes operating without a certificate of occupancy.

If you have any questions regarding this letter, please contact Miriam Helen Jones, Esq., Enforcement Officer, on 727-7770.

Sincerely,
*/s/ Hampton Cross*
Hampton Cross
Acting Administrator

cc: Patricia Montgomery
Acting Administrator
Building and Land Regulation Administration

Ferial Bishop
Administrator
Environmental Regulation Administration

No. 99-1953

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
v.
TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

# BRIEF FOR PETITIONERS


ROBERT R. RIGSBY
*Corporation Counsel*

CHARLES L. REISCHEL
*Deputy Corporation Counsel*
*Appellate Division*

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*Corporation Counsel*
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Office of the Corporation Counsel
Government of the District of Columbia
One Judiciary Square – 6th Floor South
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252/724-5691



Petition for a Writ of Certiorari filed on June 2, 2000
Certiorari granted on September 26, 2000

## QUESTION PRESENTED

*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), holds that the Seventh Amendment does not preclude district courts from exercising substantial discretion in granting new trials but does constrain appellate review of such orders. The question presented is whether, as some Circuits have recognized, *Gasperini* invalidates the contrary approach of other Circuits, including the D.C. Circuit here, which hold that the Seventh Amendment strictly circumscribes a district court's discretion to grant a new trial and thereby expands the scope of appellate review.

## PARTIES

The parties are Tri County Industries, Inc.; District of Columbia; Mayor Anthony Williams (as successor to Sharon Pratt Kelly); the District of Columbia Department of Consumer and Regulatory Affairs; the Director of the District of Columbia Department of Consumer and Regulatory Affairs, Lloyd J. Jordan (as successor to Hampton Cross); and Ted Gordon, Senior Deputy Director for Health Assurance, the District of Columbia Department of Health (as successor to Ferial Bishop, Administrator of the Environmental Regulation Administration of the District of Columbia Department of Consumer and Regulatory Affairs). Tri County Industries has represented that it is a privately owned corporation organized under the laws of Maryland; primarily engages in the business of removing underground fuel storage tanks and contaminated soil; and does not have any parent companies, subsidiaries or affiliates that issue shares or debt securities to the public.



## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . i
PARTIES . . . . . ii
TABLE OF AUTHORITIES . . . . . v
OPINIONS BELOW . . . . . 1
JURISDICTION . . . . . 1
LEGAL PROVISIONS INVOLVED . . . . . 2
STATEMENT OF THE CASE . . . . . 2

I. INTRODUCTION . . . . . 2
II. SUMMARY OF THE HISTORIC FACTS . . . . . 3
III. THE LITIGATION . . . . . 6

A. Liability . . . . . 6
B. Preliminary Matters on Remand . . . . 7
C. The First Trial . . . . . 8

1. Tri County's Case . . . . . 8
2. The Court's Conditional Evidentiary Ruling . . . . . 13
3. The District's Case . . . . . 15
4. The District Court's Evidentiary Rulings And The Jury's Verdict . . . 17

D. The District Court's New Trial Order 18
E. The Second Trial . . . . . 19
F. The D.C. Circuit's Decision . . . . . 20
G. Rehearing Denied . . . . . 22

SUMMARY OF ARGUMENT . . . . . 22

ARGUMENT . . . . . 24

I. THE D.C. CIRCUIT'S STANDARD FOR REVIEWING ORDERS GRANTING NEW TRIALS CONFLICTS WITH THIS COURT'S DECISION IN *GASPERINI*. . . . . 24

A. *Gasperini* Holds That Federal Appellate Courts Must Give Substantial Deference To District Courts In Reviewing New Trial Orders. . . . . 24

B. History Supports The District's Position. . . . . 29

1. The Jury Trial in Eighteenth Century England. . . . . 29
2. The Jury Trial in Eighteenth Century America. . . . . 33

C. This Court Has Traditionally Recognized The Primacy Of The Federal District Court Judge in Granting New Trials. . . . . 36

D. Circuit Interpretation Supports The Argument That *Gasperini* Requires Narrow Appellate Review Of The District Court's Broad Discretion To Grant New Trials. . . . . 40

E. The D.C. Circuit's Approach Conflicts With *Gasperini*, History, And This Court's Antecedent Jurisprudence. . . . . 43

II. WHEN THE PROPER STANDARDS ARE APPLIED, JUDGE ROBERTSON PLAINLY DID NOT ABUSE HIS DISCRETION IN GRANTING A NEW TRIAL. . . . . 46

CONCLUSION . . . . . 50



## TABLE OF AUTHORITIES

### CASES

*Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) . . . . . 47
*Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889) . . . . . 36
*Barreda v. Silsbee*, 62 U.S. (21 How.) 146 (1858) . . . 36
*Blunt v. Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (C.C. Mass. 1822) . . . . . 25
*Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999) . . . . 42
*Bright v. Eynon*, 1 Burr. 390, 393 (K.B. 1757) . . . . . 42
*Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958) . . . . . 26
*Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) . . . 32, 38
*Carey v. Piphus*, 435 U.S. 247 (1978) . . . . . 3, 46
*Central Office Tel., Inc. v. American Tel. and Tel. Co.*, 108 F.3d 981 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998) . . . . . 41
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*Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947) . . . . . 37
*Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2 (2d Cir. 1996) . . . . . 41
*Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2d Cir. 1961) . . . . . 25, 26, 43
*Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977) (*per curiam*) . . . . . 25
*Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933) . . . . . 27, 28

*Gasperini v. Center for Humanities*, Inc., 66 F.3d 427 (2d Cir. 1995), *vacated and remanded*, 518 U.S. 415 (1996) . . . . . 26
*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*
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*Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied sub nom., Combustion Eng'g, Inc. v. McGill*, 120 S. Ct. 329 (1999) . . . . . 41, 42
*Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997) . . . . . 20, 23, 45
*McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124 (7th Cir. 1998) . . . . . 43
*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) . . . . . 41
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*Patterson v. Portich*, 853 F.2d 1399 (7th Cir. 1990) . . 48
*Patton v. Texas & Pacific Railway Co.*, 179 U.S. 658 (1901) . . . . . 39
*Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465 (5th Cir. 1991) . . . . . 48
*Railroad Co. v. Fraloff*, 100 U.S. 24 (1879) . . . . . 36
*Southern Ry. v. Bennett*, 233 U.S. 80 (1914) . . . . . 37
*Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931) . . . . . 7, 46
*Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977) . . . 48
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*Tri-County Industries, Inc. v. District of Columbia*, 932 F. Supp. 4 (D.D.C. 1996), *rev'd*, 104 F.3d 455 (D.C. Cir. 1997) . . . . . 6



*Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997) . . . . . 2, 45
*United States v. Laub*, 37 U.S. (12 Pet.) 1 (1838) . . . 36
*Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350 (3rd Cir. 1998) . . . . . 42
*Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985) . . . . . 49

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. CONST. Art. III, sec. 2 . . . . . 34
U.S. CONST. Amend. VII . . . . . *passim*
28 U.S.C. § 1254(1) . . . . . 1
Act of September 24, 1789, ch. 20, 1 Stat. 73-93 . . 34, 35

**MISCELLANEOUS**

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DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,

v.

TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

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## BRIEF FOR PETITIONERS

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### OPINIONS BELOW

The January 18, 2000, decision of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1-10) is reported at 200 F.3d 836; 2000 U.S. App. LEXIS 624; and 50 ERC (BNA) 1249. The July 23, 1998, decision of the United States District Court for the District of Columbia (Pet. App. 12-14) is not reported.

### JURISDICTION

The D.C. Circuit issued its decision on January 18, 2000. Pet. App. 1. On February 17, petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 16 & 17. The petition and suggestion were denied on March 8. Pet. App. 16 & 17.

Petitioners filed a timely petition for a writ of certiorari on June 2. This Court granted the petition on September 26.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## LEGAL PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution (U.S. CONST. Amend. VII), which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This case also involves Fed. R. Civ. P. 59(a), which provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

## STATEMENT OF THE CASE

### I. INTRODUCTION.

This appeal involves the award of damages for a procedural due process violation -- the District of Columbia's temporary suspension, without a prior hearing, of a permit to convert a warehouse in the District into a soil remediation facility. See Joint Appendix ("J.A.") 18-30 (*Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460-62 (D.C. Cir. 1997)). On remand from that appeal, the case was tried to a jury which awarded $5,000,000 in damages. Pet.



App. 2. Following the award, the district court, the Honorable James Robertson, ordered a new trial because the damages award was grossly excessive; the permit holder had done absolutely nothing to mitigate damages; and he had disabled the jury from performing its job by excluding and striking evidence from its consideration. Pet. App. 12-14. A second jury, which considered a fuller evidentiary record in light of *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978), as well as the rule that a party must mitigate its damages arising from an unlawful injury, awarded nominal damages of $100. J.A. 7.

On appeal, citing Seventh Amendment concerns, the D.C. Circuit transformed the abuse of discretion standard of appellate review into a "more searching inquiry" standard. Pet. App. 5 & 10. Under its revised standard, the court set aside the district court's order granting the District a new trial and ordered reinstatement of the $5,000,000 damages award.

In so ruling, the D.C. Circuit contravened *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *Gasperini* holds that district court judges retain substantial discretion under the Seventh Amendment to order new trials and that appellate courts must exercise restraint in applying the abuse of discretion standard of appellate review of new trial orders. The decision here turns *Gasperini* on its head.

### II. SUMMARY OF THE HISTORIC FACTS.

In 1991, Tri County first entered the contaminated soil remediation market by opening a processing facility on New York Avenue, N.E. J.A. 40. The facility was closed because it violated the District's zoning laws. J.A. 41.

In 1993, Tri County secured a building permit to convert a warehouse several blocks away into a soil remediation

facility. J.A. 41, 126-31. In the supplement to its application, dated October 2, 1992, when Tri County was asked whether its "proposed project [will] result in an increase in vehicular traffic in the area surrounding the project," it answered: "A LITTLE EMPLOYEE." Lodging ("L.") 30; see also J.A. 94.

In July, 1993, some five months after receiving its permit, Tri County began to accept delivery of contaminated soil, although it had not yet secured a certificate of occupancy. J.A. 37 & 49; L. 1. By the end of August, Tri County was storing some 1,440 tons of contaminated soil. L. 1-3 & L. 11 (items 1-4).

On September 2, 1993, Juan Berrayarza, a veteran zoning inspector from the District's Department of Consumer and Regulatory Affairs ("DCRA"), inspected the facility. J.A. 80; L. 18-19. No one was there. J.A. 81. He saw "a big room that was full of soil, a big pile of soil." J.A. 80. While he was there, he developed "some eye irritation because of the fumes, the stink was coming out from the soil." J.A. 80. He wrote a Notice of Infraction for storing contaminated soil without a certificate of occupancy in violation of 11 D.C.M.R. § 3203.1 (June, 1986). J.A. 49, 80-81; L. 18-19.

Tri County did not respond to this Notice even though the Notice advised that Tri County would "be subject to the maximum penalties permitted by law, *suspension of your license/permit*, . . . and/or sealing of your business," and that the fine would double if not paid within 15 days. L. 19 (emphasis added); see J.A. 46. Tri County continued to accept tons of contaminated soil. J.A. 37-38 & 49; L. 4-7.

Nearby residents became concerned. On September 20, Tri County attended a community meeting about the facility.



At this meeting, Hampton Cross, DCRA's Acting Director, temporarily suspended Tri County's building permit because he had been informed (mistakenly, as it turned out) that this facility was going to be very close to a proposed housing development. Pet. App. 3; J.A. 44 & 53.

On September 22, 15 days after service of the Infraction Notice, the DCRA dispatched Phillip Thomas, a veteran construction inspector to the facility. J.A. 83. By this time, Tri County had some 1,900 tons of contaminated soil stored. L. 1-5. Not surprisingly, the inspector saw that Tri County was "storing a lot of soil in the building." J.A. 83. The Tri County representative could not produce a certificate of occupancy. J.A. 84. The inspector issued a stop work order. J.A. 84; L. 24.

Despite the stop work order (and Cross's directive), Tri County continued to buy tons of contaminated soil. J.A. 38 & 49; L. 6-7. By mid-October, it had accumulated some 2,460 tons in its building. L. 1-7 & L. 11 (items 1-8).

The DCRA's Office of Adjudication conducted a hearing on the Infraction Notice on October 13. J.A. 85; L. 20 & 22. Tri County defaulted. J.A. 86; L. 20 & 22. An Administrative Law Judge found it guilty, based on the testimony of Inspector Berrayarza who had issued the Notice, and added to the original $500 fine a $1,000 penalty and $25 in costs. J.A. 86; L. 20-21. The decision stated that failure to appeal "or to arrange for payment of all fines, penalties, and costs within fifteen (15) days of service of this decision ***SHALL OPERATE TO SUSPEND AUTOMATICALLY THE LICENSE OR PERMIT.***" L. 21 (emphasis in decision); see J.A. 88. L. 21. Tri County neither appealed nor arranged for payment. J.A. 87; L. 23.

On October 15, the DCRA's Environmental Regulation Administration ("ERA") followed up on Cross's temporary suspension. It sent a letter to Tri County, referencing the community meeting and advising that "further review is necessary" pursuant to the District's Environmental Policy Act of 1989. J.A. 145; see J.A. 49-50 & 89. The letter requested information about several health and safety matters, including the precise distance of the facility from nearby residences and from the property which Cross mistakenly believed was to be developed. J.A. 145-47.

Tri County did not answer this letter. J.A. 50, 90, 95 & 148. Shortly thereafter, in November, Tri County abandoned the project. J.A. 48.

On December 6, 1993, Cross, unaware of Tri County's decision, sent it another letter. J.A. 90 & 148-50. Citing its failure to respond to the October 15 letter, he rescinded the DCRA's environmental approval of the project. J.A. 148-50. This letter also cited Tri County's misrepresentation of the distance of its proposed facility to nearby residences as being 700 feet, as opposed to less than 100 feet. J.A. 90 & 149.

## III. The Litigation.

### A. Liability.

On September 20, 1994, Tri County brought suit in the United States District Court for the District of Columbia claiming that Cross's temporary suspension of its permit on September 20, 1993, without a prior hearing, violated the Due Process Clause of the Fifth Amendment. J.A. 1, 11 & 13. The court (Robertson, J.) dismissed the complaint for failure to state a claim. J.A. 10-17 (*Tri-County Industries, Inc. v. District of Columbia*, 932 F. Supp. 4 (D.D.C. 1996)).



The D.C. Circuit reversed and remanded the case "to consider the extent of Tri County's damages." J.A. 30. In its decision, the court observed, *inter alia*, that "Tri County took no action to challenge either the September 20 suspension, which all parties now agree had no legal basis at all, or the [September 22] stop work order, which is not challenged here and which all agree was a legally sufficient bar to Tri County's continuing work on the facility." J.A. 20; see also J.A. 25. It also directed that, "[i]n calculating any damages, . . . the possibility of relief from the District's Board of Appeals and Review, as well as the possible mooting effect of the stop work order, may be pertinent." J.A. 29-30.

### B. Preliminary Matters On Remand.

On July 25, 1997, the district court issued a preliminary decision in which it ruled that Tri County's evidence was too speculative to support an award for loss of future profits:

> The affidavit of plaintiff's environmental expert, attesting that it is "probable" that from 1994-2000 Tri County would have treated 75,000 tons of soil per year at $40/ton, is insufficient to establish loss of profits with reasonable certainty. See Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931). . . . As the record now stands, any estimate of lost profits related to Tri County's soil remediation business, a relatively new enterprise with no proven record of profits, would be based on speculation.

J.A. 33.

The record before the court included a March 24, 1995, report by Vincent N. DiRenzo, Jr., of Apex Environmental,

Inc., which had been commissioned by Tri County. J.A. 133-38. This report, which covered thermal remediation facilities in Virginia, Maryland, and North Carolina, concluded that "[i]f a facility had been able to operate a thermal treatment unit within Washington, D.C. during the time frame of the survey, it would have been very well placed to have captured a significant portion of the market." J.A.138.

At the same time, however, DiRenzo also concluded that competition was very vigorous and the prospects of profits rather dim. He reported that the market for the treatment of contaminated soil had "undergone significant change over the past three years," (J.A. 136) including the growth of on-site "bioremediation of petroleum contaminated soil" and "'cold batch' treatment of contaminated media." J.A. 136. DiRenzo also reported that the prices thermal remediation facilities could charge were "projected to remain stable throughout the time frame" because "*soil prices have dropped to the lowest point to allow for the facilities to cover operating costs.*" J.A. 137 (emphasis added). Indeed, one Maryland facility "*attempted to gain a larger portion of the market by reducing gate prices below cost. The result was that the facility had to be sold at a loss to its lenders, as it could no longer make payment on incurred debt.*" J.A. 137 (emphasis added).

### C. The First Trial.

#### 1. Tri County's Case.

Despite the court's pretrial evidentiary ruling, at a four-day trial in April, 1998, Tri County sought damages not only for the expenses it had incurred but also for more than $11,000,000 in lost future profits. Tri County's vice president, Karleen Donnells, testified that its past costs included $44,350 Tri County had paid to T.A. Bennett Trucking



Company and TSC Transport for hauling some 2,460 tons of contaminated soil to the Bryant Street facility from July, 1993, through early October, 1993. J.A. 35-38 & 132; L. 1-14. These deliveries included some 123 truckloads of soil, weighing about 20 tons per load, for which Tri County paid approximately $17.50 per ton. J.A. 37; L. 1-7 & 11.

Tri County's evidence of future costs, revenues, and lost future profits came from several sources. Glenn Selzer, President of Tri County, estimated that the cost of hauling contaminated soil to Bryant Street "would [have] run a dollar a ton" in 1994. J.A. 42.[1] He had planned to clean "[a]bout 75,000 tons" of soil each year; and he expected to sell annually 45,000 tons of clean soil at $2.00 per ton. J.A. 44; see J.A. 43. Selzer expected to need five employees to run the plant: a supervisor at an annual salary of $50,000; an assistant at $30,000; a machine operator at $30,000; and two laborers at $7.00 per hour each. J.A. 42. The plant would have operated "six days a week, a shift and a half, run 12 hours a day" plus a one-half hour equipment warm-up each day. J.A. 42; see J.A. 59. This amounted to a 75-hour work week for each employee. Tri County would have purchased used Gencor thermal remediation equipment for $600,000, or half of what new equipment would have cost. J.A. 41-42 & 47.

Tri County also called several experts. Donald G. Carter supplied evidence of utility costs for operating the plant based on his understanding that "[t]he system could do 20 tons of soil per hour." J.A. 59; see L. 17. By contrast, Alfred

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[1]By contrast, Tri County's expert, DiRenzo, had estimated that transportation costs to a Washington, D.C., facility would have been $2.00 to $3.00 per ton, while such costs in northern Virginia and Maryland had ranged from $6.00 to $12.00 per ton. J.A. 135 & 138.

Dishian, a Gencor expert, testified that it had "a nominal capacity of 25 tons an hour" and could treat as many as 40 tons per hour, depending on the moisture content of the soil. J.A. 57; see also J.A. 65 & 126.

DiRenzo also testified. In sharp contrast to his 1995 projection that the market would remain stable for thermal remediation facilities, he testified that "I don't think there's any thermal treatment units in Virginia anymore," although there were bioremediation facilities. J.A. 60; see J.A. 63. He acknowledged that there had been one thermal facility in Virginia but it had "lost" its permit. J.A. 63. In addition, there had been a thermal remediation plant in Baltimore which had gone out of business within a year of starting after competition forced it to lower its prices below its operating costs in order to gain market share. J.A. 63-64. DiRenzo reiterated his report's conclusion that the market price for treating oil-contaminated soil was $40 per ton in 1994, $38 in 1995, $35 in 1996, and was expected to be $34 from 1997 through 2000. J.A. 62. According to him, "these rates included transportation to the facilities . . .." J.A. 62.[2]

Tri County selected Joel M. Morse, a financial expert, to put the revenue and cost estimates developed by DiRenzo and others into a spreadsheet. J.A. 65 & 68-69. For example, he used the revenue-per-ton prices provided by DiRenzo starting with $40 per ton in 1994. J.A. 66-67 & 69. For transportation costs, he used the $1.00 per ton cost given by Selzer, rather than the $2.00 to $3.00 per ton cost given by DiRenzo. J.A. 141. For utility costs, he used Carter's numbers which were based on the assumption that the Gencor equipment had

[2]At the conclusion of DiRenzo's testimony, the court denied Tri County's motion to allow his 1995 report to go to the jury on the grounds that his testimony covered the substance of his report. J.A. 63.



an hourly capacity of 20 tons, rather than 25 tons (or more). J.A. 141. In preparing his spreadsheet, he did not consider whether any of the companies surveyed by DiRenzo was a "start-up" company, as Tri County would have been. J.A. 68. Based on this number-crunching exercise, Morse estimated that Tri County would have garnered profits of $11,628,174 for the period 1994 through 2000. J.A. 67. For example, in 1994, revenues would have been $3,367,500 and costs $1,335,908, resulting in a profit of $2,031,592. J.A. 67. Morse admitted that his profit estimates were those of "an extremely profitable business . . .." J.A. 70.

Insofar as the District's law-infraction citations were concerned -- the September 7 Notice of Infraction and the September 22 stop work order -- Selzer denied that he had been doing anything wrong. According to him, Tri County had purchased contaminated soil in order to perform the stack tests that would have been needed to demonstrate that it should be given a certificate of occupancy, so that Tri County could begin to operate the facility. J.A. 46. He admitted, however, that at most, 275 tons of soil were needed to perform these tests, or about 15 truckloads. J.A. 51-52. Tri County, however, had purchased nearly ten times that amount. Selzer also testified that he did not bother to pay the modest fines the District had imposed or to remove the contaminated soil in the fall of 1993 because "[t]he real problem was Mr. Cross suspended our construction permit, and we had no way of knowing whether we were ever going to be . . . able to continue with the project . . .." J.A. 46.

However, when asked why Tri County did not respond to Cross's October 15, 1993, invitation to be heard on the September 20 suspension, Selzer replied that Tri County had not done so because it already had provided "all this information months before they sent the letter." J.A. 50; see J.A. 51.

Finally, Selzer explained why Tri County did not challenge Cross's September 20 suspension. According to him, Jonathan L. Farmer, Tri County's counsel at the time, had advised that an appeal "would take at least a year," the District's Board of Appeals and Review ("BAR") "was politically motivated," and it would have cost "close to a million dollars to appeal it . . .." J.A. 47 & 48. Farmer, although testifying that he had estimated eight months to a year for an appeal, did not confirm Selzer's other two points. J.A. 54. He did testify that Tri County could have taken an appeal to the BAR or to the Board of Zoning Adjustment.[3] J.A. 54.

On the issue of health and safety, Tri County produced Alfred Dishian as an expert. J.A. 55. He explained the process for thermal remediation in the Gencor unit that Tri County intended to use. The soil is heated to a temperature of 600 to 700 degrees Fahrenheit and the gases are drawn from the soil and then heated to "approximately 1600 degrees Fahrenheit which guarantees" that "the gases coming out . . . will be 99 percent free of petroleum." J.A. 56. According to Dishian, the health and safety risks associated with handling and remediating contaminated soil are "[n]o more than filling up your car with gasoline." J.A. 58.

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[3]For reasons we do not understand, the D.C. Circuit stated that Farmer "testified that Cross told him that the Board of Appeals and Review would act at the direction of the District's Mayor and the Mayor's chief of staff." Pet. App. 6 n.2. This was not his testimony, however. To the contrary, Farmer testified that he had told his client that the decision to go forward "was really a business decision," advice he would not likely have given if the result, in his mind, was a foregone conclusion. J.A. 54.



**2. The Court's Conditional Evidentiary Ruling.**

At the close of Tri County's case, the District moved for judgment as a matter of law. J.A. 78. Although the court denied the motion, it expressed concern about several aspects of the case, including the paucity of evidence supporting Tri County's claim for lost profits and Tri County's failure to take any steps to mitigate the damages that allegedly flowed from Cross's suspension of its building permit on September 22:

> THE COURT: . . . Now, the future earnings case . . . what is missing from this record . . . is evidence of the market for processing all this soil.
>
> Now, I know there's an expert who said, "Oh, yeah, there's enough soil around here to bring 75,000 tons a year." Sure, there's plenty of soil around; but you need more than soil, you need some established position in the marketplace.
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> This -- there's nothing in the calculations of any of these experts that there's any buildup. This company is going 75,000 tons a year from day one of these calculations, all the way through, full capacity. No evidence about how he gets there, how he markets it, how he's going to make this thing run. And the expert -- the financial economist conceded that the profitability figure for this company is extraordinary.
>
> It looks very speculative to me. Now, I'm going to consider this further between now and the time this case goes to the jury. I'm not sure I'm going to send the future earnings question to the jury. If I do, however, it will be with the same ruling that I'm making now, which . . . is the conditional ruling that Rule 50 requires. . . .
>
> I think there is a hinge here somewhere between the past -- between the money that Tri County sank

into this enterprise of $600,000 and future earnings. The hinge has something to do with mitigation. It is one thing to say, as Tri County does say, it would have cost us a million dollars to save $600,000 because we would have had to buy the equipment and wait out an appeal.

That's perfectly understandable and maybe a complete defense to the mitigation claim with respect to the monies that were spent and lost; but for Tri County to make that decision, walk away from this, and then go for all of the future earnings without sinking the money into the appeal and going the next step to mitigate or to hang in there in a way that would permit them to pursue future damages may -- I say "may," because I'm not ruling at this time -- may as a matter of law mean that they're not entitled to future profits.

. . . Mr. Emig . . . what you have is a spreadsheet; you have a pro forma, without, it seems to me, very good proof either that the company could actually start up and do it or that there was a market for the numbers in the spreadsheet. And secondly, as I say, I've got this problem with mitigation. . . .

There's a line in your expert's report about how the competition is driving down the price per ton until it just covers operating costs.

MR. EMIG: Uh-huh.

THE COURT: And that that has driven one of the competitors out of business because he tried to take on too much. He didn't cover his operating costs.

Your numbers do a lot more than cover operating costs. They cover operating costs and return a profit of over 50 percent.

MR. EMIG: Right.



THE COURT: There's a query whether your own evidence establishes that you really have a market-competitive product here. . . . Whether it can . . . sell its own services at that price and deliver that profit is another question . . .. I think what I'm inclined to do is to let the jury decide how speculative that is and then go back and look at it with the luxury of a little hindsight and determine -- and if they -- if they think it is not too speculative, then, of course you have a leg up, but then I will have to decide how speculative it is as a matter of law and whether they should have had the case in the first place.

J.A. 77-80; see also J.A. 119 & 121.

### 3. The District's Case.

At trial, the District had several major themes. First, Tri County had failed to establish any basis for an award of lost future profits. In addition, the District made two basic *Carey v. Piphus* arguments: (1) all or some of Tri County's damages following Cross's procedurally deficient suspension of its permit on September 20 would have occurred nevertheless because of events independent of the suspension (*i.e.*, the stop work order issued two days later; the automatic suspension of Tri County's building permit following its default on the early September Notice of Infraction; and other regulatory health and safety hurdles); and (2) Tri County had failed to mitigate, or to avoid, avoidable damages arising from the District's failure to afford it an opportunity to be heard prior to Cross's suspension. *See, e.g.*, J.A. 72-77, 89, 93 & 120-21.

Inspector Berrayarza explained why he had issued the Notice of Infraction in early September, 1993: Tri County was operating its business without a certificate of occupancy

as required by 11 D.C.M.R. § 3203.1, a certificate which could not be issued without numerous safety and health inspections. J.A. 80-81. Inspector Thomas, who had issued the September 22 stop work order, concurred. Tri County "was storing a lot of soil in the building" and a Tri County representative was "working" "by the weight station" and could not produce a certificate of occupancy. J.A. 82 & 83.

Lennox Simon, who was employed by the DCRA's Office of Adjudication, described the October 13 hearing on Tri County's Notice of Infraction, including Tri County's failure to appear and the Office's finding of guilt. J.A. 84-86. The Office's decision explained that Tri County's failure to appeal or to pay the fine within 15 days of service of the decision "'shall operate to suspend automatically the license or permit until the assessment is paid.'" J.A. 88. Tri County, however, neither appealed nor paid. J.A. 87.

On the matter of the September 20 suspension, Cross explained that the October 15, 1993, letter "was sent to . . . *establish a process which would afford -- which would resolve the issues that had arisen, to establish a process and to get the necessary information from Tri County.*" J.A. 89 (emphasis added); see also J.A. 93. He did not believe that Tri County had supplied all the information sought in the letter, and he confirmed that the District's BAR was an agency independent of the Mayor. J.A. 90-92. See also J.A. 102 (Sweeney). In support of Cross's testimony, the District introduced "the two letters from the District of Columbia government to Tri County, October 15 and December 6, 1993, asking for follow-up information and informing them that they would be suspended if they didn't give that information." J.A. 122.

Insofar as health and safety is concerned, the District called a DCRA environmental specialist, James Sweeney, who



testified, *inter alia*, that Tri County had misrepresented in its application the distance of its plant from nearby residences and the traffic this facility would cause. J.A. 93-99. Although Selzer had informed the DCRA that the closest residence was more than 700 feet, or more than two football fields, away from the facility, the closest house was only 50 to 70 feet away and there were other homes within 700 feet. J.A. 96.

In addition, the District unsuccessfully proffered Dr. Alfred A. Siess to demonstrate that Tri County's proposed plant presented serious health and safety risks. J.A. 104-10. Dr. Siess explained to the court that the health and safety risks of thermal remediation of oil-contaminated soil were greater than those of other methods; that Tri County's application was incomplete; and that its proposed method of performing the required stack tests -- using soil that had been stored "for a long period of time" "would be completely inappropriate for running any kind of a meaningful stack test." J.A. 108. In Pennsylvania, for example, every application for a permit to treat contaminated soil thermally, whether using Gencor or other equipment, had been "rejected because of not meeting requirements for protecting the health, safety, and welfare." J.A. 111; see also J.A. 112.

Finally, Francine James described the BAR's procedures for emergency appeals and stays of adverse agency decisions. J.A. 103.

### 4. The District Court's Evidentiary Rulings And The Jury's Verdict.

Importantly, before sending the case to the jury, the court, acting on a motion from Tri County, struck "all . . . of the testimony . . . on the health and safety aspects of this project" because it had determined "that the permitting process fully

considered those issues and resolved them." J.A. 123.[4] The evidence stricken included much of the testimony of the District's environmental specialist, Sweeney, and of Cross. See J.A. 91 & 122-23. In addition, because they raised health and safety concerns, the court struck the District's October 15 invitation to Tri County to be heard, as well as the December 6 letter suspending its project for failing to respond to the earlier letter and for misrepresenting the distance of its facility from nearby residences. J.A. 119 & 122.

On this truncated evidentiary record, the jury awarded $5,000,000. The District filed a motion for judgment as a matter of law or, in the alternative, for a new trial.

**D. The District Court's New Trial Order.**

The district court granted a new trial for several reasons. First, although Tri County could be excused from expending money to protect its investment of under $500,000 in the project, it was "unreasonable *per se*" for Tri County to take the position that it was entitled to some $11,000,000 in future profits "without investing a penny to seek reinstatement of the unlawfully suspended building permit." Pet. App. 13.

Second, "[t]he jury's award of future profits . . . was based on expert testimony that should not have been received -- or, at least, should not have been received without allowing the District of Columbia to adduce proof that plaintiff's soil remediation facility would never have been permitted to operate." Pet. App. 13. The court criticized Tri County's "pro-forma statement of income and expenses" (Pet. App. 13),

[4]However, Tri County's permit required it to comply with District laws and subjected it to numerous reviews, reporting requirements, and conditions. J.A. 126-31.



which it had ruled pretrial was "insufficient to establish loss of profits with reasonable certainty." J.A. 34. Furthermore, Tri County had "no experience in the business of 'burning' soil for remediation" and Tri County's expert had failed to analyze the significance of "the recent failure of a similar remediation facility in Virginia" and of "the diminishing market price per ton for cleaning petroleum contaminated soil." Pet. App. 13.[5]

Third, "the jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience, particularly in view of the realistic prospect, which I did not permit defendants to prove at trial, that there would be continued community resistance" to the project and "a very real likelihood that the District of Columbia would have closed down the remediation facility sooner or later in any event, or that it never would have been permitted to commence operations at all." Pet. App. 13-14.

Accordingly, a new trial was necessary unless Tri County accepted "a remittitur of the jury's verdict to $1 million." Pet. App. 14. Tri County declined.

**E. The Second Trial.**

At the second trial, the court admitted the District's evidence (1) supporting its *Carey v. Piphus*/mitigation-of-damages arguments and (2) rebutting Tri County's claims that only Mr. Cross's temporary suspension of its building permit

[5]As noted, Tri County's *pro forma* statement projected whopping profits. For example, in its first year of operation, it projected revenues of $3,367,500 and expenses of $1,335,908, resulting in a profit of $2,031,592, a profit even its financial expert admitted was extraordinary. J.A. 70.

stood in the way of it securing a certificate of occupancy. This evidence included the District's written invitation to Tri County to be heard and its failure to respond. This evidence also included health and safety information about the project and the regulatory hurdles Tri County would have faced irrespective of the procedurally flawed suspension.

With a more complete record before it, the jury returned a verdict of $100. J.A. 7.

**F. The D.C. Circuit's Decision.**

Tri County appealed the order granting the new trial. The D.C. Circuit reversed using, as its standard of review, its recently developed "more searching inquiry" standard. Pet. App. 5 & 10. *See, e.g.*, *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997); *Hutchinson v. Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992). This standard arises from the court's "'concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding mission.'" Pet. App. 5, quoting *Langevine*, 106 F.3d at 1023. Accordingly, "close scrutiny is required in order to protect the litigants' [Seventh Amendment] right to jury trial." *Hutchinson*, 952 F.2d at 1421.

Using its "more searching inquiry" standard, the D.C. Circuit ruled that the district court had abused its discretion in granting a new trial. Thus, despite acknowledging the legal requirement that an injured party take "all the reasonable steps" to mitigate its damages, Tri County, even when seeking more than $11,000,000 (and recovering some $4,500,000) in lost future profits, need not take *any steps* at all. Pet. App. 7. In the D.C. Circuit's view, the district court's failure-to-mitigate ruling was an improper *per se* ruling. Pet. App. 7.



The court also "question[ed]" the ruling that the award was grossly excessive and shocking. Pet. App. 9. In its view, the award was reasonable because it was less than half the amount Tri County had claimed. Pet. App. 9.

Finally, the D.C. Circuit stated:

> . . . [T]he trial court tried to cover all bases in its order granting a new trial but the order reveals that the court's real concern was its exclusion of evidence regarding health and safety issues which may have led to community resistance and, perhaps, regulatory barriers to Tri County's project.

Pet. App. 9. In assessing the evidentiary rulings, the D.C. Circuit did not ask whether the district court had acted permissibly in ultimately concluding that it should have admitted this evidence. Instead, in an effort to preserve the jury's verdict, the D.C. Circuit asked whether the district court could permissibly have excluded the District's health and safety evidence. The D.C. Circuit ruled that "the district court did not abuse its discretion in excluding the evidence." Pet. App. 10. Again invoking its "'more searching inquiry'" standard, the court ruled: "In light of our findings that Tri County's evidence was properly before the jury and the District's evidence was properly excluded, we conclude that the district court, in granting a new trial based on a revised view of its original rulings, did abuse its discretion." Pet. App. 10.[6]

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[6]For reasons we do not understand, the D.C. Circuit mistakenly seemed to believe that the District's written invitation to Tri County to be heard and Tri County's refusal to respond were relevant only to whether legitimate health and safety concerns might have impeded Tri County. (continued...)

**G. Rehearing Denied.**

The District filed a petition for rehearing and suggestion for rehearing *en banc*. It argued that the D.C. Circuit had extant two conflicting standards for reviewing district court orders granting new jury trials and that *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), unequivocally had ruled that the District's proffered standard -- an abuse of discretion standard that accords substantial deference to the trial court -- was correct. In addition, and related to that point, the District urged that the court had erred in reviewing the district court's trial decisions excluding and striking evidence, rather than its ultimate, post-trial decision that this evidence should have been admitted, and thus that a new trial was required for that reason, as well as for the others set forth in its new trial order. J.A. 7.

The D.C. Circuit denied rehearing. Pet. App. 16 & 17.

## SUMMARY OF ARGUMENT

The D.C. Circuit impermissibly overturned the considered judgment of the district court ordering a new trial and thus improperly reinstated a $5,000,000 jury verdict against the District of Columbia. For the reasons that follow, this Court should reverse the decision and affirm the new trial order.

In *Gasperini*, this Court held that the Seventh Amendment affords district court judges broad discretion in overseeing

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[6](...continued)
This oversight is important, given that this case is a procedural due process case in which Tri County claims damages arising from the absence of an opportunity to be heard and the District contends that Tri County failed to mitigate its damages from the procedurally flawed suspension.



jury trials and that appellate courts are correspondingly strictly constrained by an abuse of discretion standard in reviewing new trial decisions. By contrast, the D.C. Circuit maintains that the Seventh Amendment strictly limits the discretion of district court judges to order new trials and that, as a result, appellate courts must apply a "'more searching inquiry'" standard in reviewing orders granting new trials. Pet. App. 5, quoting *Langevine*, 106 F.3d at 1023; see also Pet. App. 10. The D.C. Circuit's standard is flatly inconsistent with *Gasperini*.

As an adjunct to its "more searching inquiry" standard, arising from its Seventh Amendment concerns, the D.C. Circuit also ruled that it will review, under an abuse of discretion standard, evidentiary rulings at trial even when the district court judge, upon reflection and in the context of the entire case, has abandoned those rulings in a post-trial order granting a new trial. Accordingly, the ultimate judgment of the district court judge may be ignored even if that judgment is not an abuse of discretion. This approach wrongfully permits an appellate court to substitute its judgment for that of the trial judge.

This Court should make clear that *Gasperini* directs that appellate courts give ample deference to the judgments of district court judges when they order new trials. This approach is also supported by history, longstanding precedents of this Court, and post-*Gasperini* Circuit decisions. This authority establishes that the abuse of discretion standard applies to appellate review of orders granting new trials and requires appellate courts to accord deference to the unique position of the district court.

When the correct standard is applied, it is clear that the D.C. Circuit wrongly substituted its judgment for the consid-

ered judgment of the district court ordering a new trial. Judge Robertson acted well within his discretion in ruling that a new trial was necessary because, *inter alia*, (1) Tri County's *pro forma* profit projections were speculative, given the evidence of real market conditions; (2) an injured party who seeks more than $11,000,000 in damages, based upon a procedural due process violation, cannot be said to have taken reasonable steps to mitigate damages when it takes no available steps whatsoever; and (3) his evidentiary rulings disabled the jury from properly performing its function.

## ARGUMENT

### I. THE D.C. CIRCUIT'S STANDARD FOR REVIEWING ORDERS GRANTING NEW TRIALS CONFLICTS WITH THIS COURT'S DECISION IN *GASPERINI*.

#### A. *Gasperini* Holds That Federal Appellate Courts Must Give Substantial Deference To District Courts In Reviewing New Trial Orders.

*Gasperini* was a diversity case in which this Court, in a complex decision, ruled that federal courts, without offending the Seventh Amendment, could apply a state statute authorizing them to determine whether jury verdicts deviate materially from what would be reasonable compensation.[7] In *Gasperini*, the Court also addressed the respective roles of federal trial judges and appellate courts in administering the substantive

[7]Under the state law, courts were "empowered to review the size of jury verdicts and to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'" *Gasperini*, 518 U.S. at 418. The law also provided that both the state trial, and the intermediate appellate, courts should apply this standard. *Id.* at 437-38.



law governing damages. Even in a diversity case, these are distinctly federal questions: "'The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law.'" *Id.* at 437, quoting *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (*per curiam*).

*Gasperini* stands for two fundamental principles. First, despite the Reexamination Clause of the Seventh Amendment, appellate courts may review orders granting or denying new trials on evidentiary grounds. Second, appellate courts, in reviewing such orders, must exercise "'restraint'" and "'*give the benefit of every doubt to the judgment of the trial judge.*'" *Gasperini*, 518 U.S. at 438-39, quoting *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961) (emphasis added). Or, as this Court put it twenty years ago, "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

In so ruling, the Court relied on history and longstanding precedent. It acknowledged that "'[t]he power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government.'" 518 U.S. at 433, quoting 6A MOORE'S FEDERAL PRACTICE ¶59.05[2], pp. 59-44 to 59-46 (2d ed. 1996). Furthermore, quoting Justice Story, the Court reaffirmed that, "'[i]f it should clearly appear that the jury have committed a gross error . . . or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'" 518 U.S. at 433, quoting *Blunt v. Little*, 3 F. Cas. 760, 761-62 (No. 1,578) (C.C. Mass. 1822). In short, "'the trial judge in

the federal system . . . has . . . *discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence*,'" and this "*discretion includes overturning verdicts for excessiveness* and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." 518 U.S. at 433, quoting *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 540 (1958) (brackets supplied by the Court) (emphasis added).

History thus makes clear that "primary responsibility" for application of damages law is "lodge[d] in the district court, not the court of appeals . . .." 518 U.S. at 438. There are sound reasons for this allocation of power: "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' . . . while appellate judges see only the 'cold paper record.'" 518 U.S. at 438, quoting respectively *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969), and *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427, 431 (2d Cir. 1995). As a consequence, if an appellate court reverses, "'it must be because of an abuse of discretion . . .. The very nature of the problem counsels restraint . . ..'" 518 U.S. at 438, quoting *Dagnello*, 289 F.2d at 806. Such restraint requires a federal appellate court to "'*give the benefit of every doubt to the judgment of the trial judge.*'" 518 U.S. at 438-39, quoting *Dagnello*, 289 F.2d at 806 (emphasis added).

In *Gasperini*, no Member of this Court questioned the principle that a judicial grant of a new trial in appropriate cases was a central feature of the English common law in the Eighteenth Century. Instead, the Court divided over how the particulars of Eighteenth Century practice should be applied to our modern federal judicial system. By the mid-Eighteenth Century, England had developed a judicial system in which *en*



*banc* trial courts were granted the power to review a single judge's written recommendation of a new trial on fact-based grounds. The judge who presided over the case "rode the Circuit" throughout England and sat as a court *nisi prius*, replacing a system in which all jury trials were held at Westminster. *See, e.g.*, *Gasperini*, 518 U.S. at 455 (Scalia, J., dissenting); G.R.Y. Radcliffe & Geoffrey Cross, THE ENGLISH LEGAL SYSTEM 90, 183-84 (3d ed. 1954). The full trial court, which sat at Westminster, reviewed the judge's recommendation for a new trial; the formal appellate court could review a jury verdict only for errors of law. *See, e.g.*, *Gasperini*, 518 U.S. at 443 (Stevens, J., dissenting); *id.* at 455-56 (Scalia, J., dissenting); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482 n.9 (1933); Radcliffe & Cross, *supra*, at 211-12; Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, 11 FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2819 at 204 (2d ed. 1995).

In *Gasperini*, the Court was faced with a thorny problem. The first Congress, which had approved the Seventh Amendment expressly referencing the common law as a guide, had not adopted the *nisi prius* system of court organization in which trial courts sat *en banc* to review new trial recommendations on evidentiary grounds. See *infra* at 34-35. Accordingly, unless federal appellate courts were given some authority to review new trial rulings on such grounds, the decisions of individual district court judges, in contrast to common law practice, would be unreviewable. On the other hand, formal appellate courts in mid-Eighteenth Century England were limited to reviewing errors of law, and extending them a role in reviewing new trial rulings on fact-based grounds would also be contrary to common law practice.

In *Gasperini*, the majority found that English common law would permit today modest appellate review, under an abuse

of discretion standard, of a district court's new trial ruling based on evidentiary concerns. In other words, the modern federal appellate court could play, in a limited fashion, the role played by the full Eighteenth Century trial court sitting in Westminster. 518 U.S. at 435-36. By contrast, Justice Stevens would have allowed federal appellate courts a larger role. *Id.* at 439-49. Again, by contrast, Justice Scalia, joined by the Chief Justice and Justice Thomas, would have ruled that these courts are limited to performing the role of a formal appellate court of the Eighteenth Century and thus restricted to reviewing only purported errors of law. *Id.* at 449-62.[8]

Despite these disagreements, however, no Member of this Court denied the central role and responsibility of the *nisi prius* judge in setting aside a jury verdict based on a re-examination of the facts and similar matters. Unquestionably, moreover, a new trial was an important feature of the common law right to a jury trial. As Blackstone wrote: "[L]ong experience has shewn[] that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel or attornies, or even of the judge or jury." III William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 393 (1768) (A FACSIMILE OF

[8]Although we have recited relevant historical facts from the dissenting opinions in *Gasperini*, we agree with the middle position taken by the Court. As Professor E.W. Hinton observed in criticizing *Fairmount Glass Works*, holding that federal court appellate review is limited to errors of law, "[i]t is to be regretted that the majority opinion [in that case] should strain the doctrine of discretion to limit the power of appellate review, when the absence of a [trial] court in banc has deprived the litigant of an important common law safeguard." Hinton, *Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 U. Chi. L. Rev. 111, 114 (1933).



THE FIRST EDITION OF 1765-1769) (Univ. of Chicago Press (1979)).[9]

**B. History Supports The District's Position.**

In *Gasperini*, this Court undertook an extensive examination of history in reaching its conclusions. Here, we merely emphasize several aspects of the history of the Seventh Amendment that shed light on the relationship between the trial judge and the jury. This history supports the argument that, under the Seventh Amendment, a district court judge has broad discretion to order new jury trials for a variety of reasons, including his determination that the verdict is against the weight of the evidence, the damages award is excessive, and/or he unwisely excluded evidence from the jury's consideration. An order granting a new jury trial does not deprive a prevailing litigant of its constitutional right to a jury trial, whether that litigant be a plaintiff or defendant, but only of a particular verdict.

**1. The Jury Trial in Eighteenth Century England.**

By the mid-Eighteenth Century in England, the writ of attaint, permitting severe penalties to be imposed on jurors who failed to render a proper verdict, had fallen into disfavor and had been largely replaced by a court order granting a new trial. III Blackstone, COMMENTARIES, *supra*, at 374-75 &

[9]Professor John H. Langbein, who wrote the introduction to this volume, states that "there is much reason to believe that Blackstone's assessment" of the efficiency of civil jury trials "was a fair one" at the time. *Id.* at vii.

389.[10] According to Blackstone, a litigant at that time could be awarded a new trial, and the judgment suspended, for a variety of reasons:

> Of this sort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves: **also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has mis-directed the jury, so that they found an unjustifiable verdict**; for these, and for other reasons of the like kind, it is the practice of the court to award a *new*, or a second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of two preceding ones.

*Id.* at 387 (bold added; italics in original) (footnotes omitted). *See also id.* at 388 (". . . [T]he maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is intitled to another.") (footnote omitted); Thomas Wood, AN INSTITUTE OF THE LAWS OF ENGLAND 602 (3d ed. 1724) ("A Verdict may be set

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[10]We rely heavily on Blackstone because of his prominence not only in Eighteenth Century England but also Eighteenth Century America. As one noted scholar has stated, "the important thing about the *Commentaries* is not that an obscure lecturer at Oxford wrote them, but that, for more than a hundred years, thousands upon thousands of lawyers and influential laymen on both sides of the Atlantic read them and believed them." Grant Gilmore, THE AGES OF AMERICAN LAW 5 (1977).



aside by the Judge, If it appears to Him to be Given against Evidence, or against His Direction, or where they Give Excessive Damages, &c. and He may Order a New Trial."); J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 100-01 (3d ed. 1990).

There were several reasons for the disappearance of the writ of attaint and the emergence of a new trial as a remedy for unsound jury verdicts. These reasons also caused the broadening of the grounds for a new trial well beyond jury misconduct that amounted to perjury. Very early on, the jury was composed of people who knew about the dispute; evidence was not necessary; and the trial judge necessarily played a very limited role in their decision. *See, e.g.*, Blackstone, *supra*, 374-75; Note, *Appealability of Rulings on Motion for New Trial in the Federal Courts*, 98 U. Pa. L. Rev. 575 (1950); Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. of Legal History 201, 201-02 (1988). In addition, the writ of attaint "laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress." Blackstone, *supra*, at 389. Finally, given that jurors were no longer personally knowledgeable about the case before them and heard evidence instead, judges began to understand that erroneous and unjust verdicts may stem from causes other than juror misconduct:

> Our ancestors . . . supposed that, the law being told to the jury by the judge, the proof of fact must always be so clear, that, if they found a wrong verdict, they must be willfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the greatest searcher of hearts; and he may, on the contrary, find a verdict very manifestly wrong, without any bad mo-

> tive at all: from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes.

*Id.* at 389.[11] In addition, "[i]n the hurry of a trial the ablest judge may mistake the law, and misdirect the jury; he may not be able to state and range the evidence as to lay it clearly before them; nor to take off the artful impressions which have been made on their minds by learned and experienced advocates." *Id.* at 390. Even "the most intelligent and best intentioned men may bring in a verdict, which they themselves upon cool deliberation would wish to reverse." *Id.* at 390.

As a consequence, a new trial, rather than being in derogation of the common law right to a jury trial, was part and parcel of that guarantee:

> GRANTING a new trial, under proper regulations, cures all these inconveniences [, errors and misimpressions by the trial judge and the jury,] and at the same time preserves intire and renders perfect that most excellent method of decision, which is the glory of the English law. *A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. . . . The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is*

[11]The common law in Eighteenth Century England provided for correction of jury verdicts even though the trial judge played a very active role in advising the jury – "by his weighing of the evidence before them, and by observing where the question and knot of the business lies, and by showing them his opinion even in matter[s] of fact, which is a great advantage and light to laymen." *Capital Traction Co. v. Hof*, 174 U.S. 1, 14 (1899) (internal quotation marks omitted).



> *more master of the subject; and nothing is now tried but the real merits of the case.*

*Id.* at 391 (emphasis added). Had the first jury "possessed the same lights and advantages" as the second, they "would probably have altered their own opinion." *Id.* at 391.

### 2. The Jury Trial in Eighteenth Century America.

At the time the Seventh Amendment was proposed, the procedures for precluding civil cases from being presented to juries and for setting aside their verdicts varied among the 13 original states. *See, e.g.*, Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 299-320 (1966). This was because each of the states "had begun borrowing from a slightly different stage of English historical development" and "the English practice itself [had not] attained any systematic clarity." *Id.* at 299. However, "the new trial, when a verdict was 'against the law' or 'against evidence,' was used in eleven . . .." *Id.* at 313. New Hampshire and Massachusetts, for example, "granted the equivalent of new trials as of right . . . regardless of the state of the evidence." *Id.* at 313. And, in Massachusetts, litigants could secure as many as five new trials until 1757, when, by statute, they were limited to "'the best two out of three . . ..'" *Id.* at 313.

On September 17, 1787, the Constitution was approved in Philadelphia; it became effective on June 21, 1788.[12] Article III provided that, except in cases affecting ambassadors and the like and cases in which a state is a party, "the supreme

[12]The dates in this section of the brief come from the Commission on the Bicentennial of the United States Constitution, The Constitution of the United States 36-37 (1987).

Court shall have appellate Jurisdiction, both as to Law *and Fact*, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONSTITUTION Art. III, sec. 2 (emphasis added). Article III engendered spirited antifederalist opposition within the country for two principal reasons. See Henderson, *supra*, at 292-99; Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. Rev. 483, 498 (1985). First, the grant to the Supreme Court of the power to review facts invoked the memory of the distant Privy Council in England overturning jury verdicts rendered in the colonies. Henderson, *supra*, at 295; Homer Carey Hockett, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 54-55 (1939). Second, there was no guarantee of a trial by a jury of one's peers in civil cases. *See* Henderson, *supra*, at 297; Parker, *supra*, at 498.

The first Congress convened on March 4, 1789. By agreement between the anti-federalists and the federalists during the ratification of the Constitution, it quickly enacted the Judiciary Act, Act of September 24, 1789, ch. 20, 1 Stat. 73 (1789), and approved the Seventh Amendment. Sections 9, 12, and 13 of the Judiciary Act provided that "the trial of issues in fact . . . shall be by jury" in all United States courts having original jurisdiction (the district, circuit, and Supreme Court). 1 Stat. 77, 80 & 87. The establishment of thirteen district courts ensured that jury trials would be conducted locally. Judiciary Act, §§ 2-4 & 9, 1 Stat. 73-75 & 76-77. Section 17 of the Act, mirroring the Seventh Amendment, provided that "all the . . . courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law . . .." 1 Stat. 83. Finally, the Act provided for judicial review of civil judgments only "'upon a writ of error'" and stated that "'there shall be no



reversal in either [the Circuit or Supreme Court] . . . for any error of fact.'" Judiciary Act, § 22, 1 Stat. 84-85.

The Seventh Amendment, which was approved by Congress and transmitted to the state legislatures on September 25, 1789, contained very general language, largely because of the varying practices of the states. *See* Henderson, *supra*, at 294. It provides, in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." It became effective as part of the Bill of Rights on December 15, 1791.

In contrast to the spirited opposition to Article III because it authorized the Supreme Court to review facts on appeal and failed to provide for jury trials in suits at common law, "[n]owhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific 'legislative history' of the Bill of Rights can any evidence be found that the relationship of judge to jury was considered as affected in any but the most general way by the seventh amendment, or even that it was considered at all." Henderson, *supra*, at 290. The absence of any debate suggests a consensus that federal trial judges could grant new trials in the circumstances permitted by the English common law.

### C. This Court Has Traditionally Recognized The Primacy Of The Federal District Court Judge In Granting New Trials.

*Gasperini's* emphasis on the primacy of the trial court in reexamining facts is not new. This Court has long recognized that federal trial courts may order new trials on evidentiary

grounds. *See, e.g., United States v. Laub*, 37 U.S. (12 Pet.) 1, 9 (1838) ("For it is a point too well settled, to be now drawn in question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial . . .."); *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166 (1858) (observing that "it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable"); *Railroad Co. v. Fraloff*, 100 U.S. 24, 31 (1879) (Harlan, J.) (If a jury has awarded too large a verdict, because of "a gross mistake of facts," or "some improper influence or bias, the remedy . . . rested with the court below, under its general power to set aside the verdict."); *Northern Pac. R.R. v. Herbert*, 116 U.S. 642, 646-47 (1886) (Field, J.) ("The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the [trial] court. It held that the amount found was excessive, but that no error had been committed at trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand."); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 74 & 75-76 (1889) (Harlan, J.) (upholding decision of trial court to remit a jury verdict against a challenge by defendant that the remission, which was accepted by the plaintiff, denied it its Seventh Amendment right to a trial by jury; affirming that the remission practice approved in *Railroad Co. v. Herbert* "is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury"; observing that "[i]t cannot be disputed that the [trial] court is within the



limits of its authority when it sets aside the verdict of the jury, and grants a new trial, where the damages are palpably or outrageously excessive"; and holding that "[w]hether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the [trial] court"); *Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) (upholding decision of state trial court to remit a jury verdict in a negligence case brought pursuant to federal law against defendant's argument that the verdict was still too excessive and holding that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court"); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) (recognizing that discretion to direct a verdict or to order a new trial is reposed in the district court; that the district court "can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses" because he "saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart" and thus has "a perspective peculiarly available to him alone").[13]

There are several cases of particular interest here. In *Metropolitan R.R. v. Moore*, 121 U.S. 558 (1887), this Court ruled that the general term of the supreme court of the District

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[13]We acknowledge that many of these cases, if not all, also ruled that federal appellate courts may review decisions of district courts only for legal error, a rule that was abandoned by this Court in *Gasperini*. However, as the opinion for the Court also indicates, it did not question the validity of these cases insofar as they addressed the relationship between the district court and the jury.

of Columbia could review orders of the special term of the *same court* granting or denying motions for a new trial on the ground that the jury's verdict "was against the weight of the evidence . . .." *Id.* at 570. However, as in the case of the *nisi prius* system in Eighteenth Century England, this Court ruled that the general term must give deference to the judge who heard the case:

> It is quite true . . . that the judge sitting at special term on the trial of a cause by a jury is, from the nature of the case, better qualified, because he sees the witnesses and hears them testify, to judge whether the verdict is warranted by the evidence, than other judges, even of the same court, who are called in to decide the same question upon a report of the testimony in writing; and where the question comes up in general term, on an appeal, all proper allowance will be made, in its consideration, for that difference, and its due weight given to the order of the judge at special term . . ..

*Id.* at 573.

In *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), this Court held that the Seventh Amendment was not offended by a two-tier jury system established by Congress for the District of Columbia in which certain causes were to be tried first before a justice of the peace, either with or without a jury, and which permitted either party in a case involving more than $20 to secure another jury trial in the local supreme court. The fact that the first jury trial did not satisfy the Seventh Amendment did not render the system unconstitutional. This Court explained that the right to a jury trial was not satisfied merely by having 12 men decide a case. Instead, "it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence." *Id.* at 13-14.



In *Patton v. Texas & Pacific Railway Co.*, 179 U.S. 658 (1901), this Court affirmed a decision of the court of appeals affirming a decision of the trial court to direct a verdict for the defendant at the second trial of a negligence case. In ruling that the directed verdict was proper, even though the first jury had rendered a verdict for plaintiff, this Court acknowledged that "seldom [does] an appellate court reverse[] the action of a trial court . . . for a verdict one way or another." *Id.* at 660. It explained that the trial

> judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.

*Id.* at 660.

In short, this Court has long recognized that the Seventh Amendment does not preclude federal trial judges from ordering new trials either because they have concluded that the weight of the evidence does not support the verdict, the damages award is excessive, or for other evidentiary reasons.

Indeed, federal trial judges promote the values of the Seventh Amendment when ordering a new jury trial on these grounds.

### D. Circuit Interpretation Supports The Argument That *Gasperini* Requires Narrow Appellate Review Of The District Court's Broad Discretion To Grant New Trials.

Despite the clarity of this Court's jurisprudence, there has long been an intolerable conflict among the Circuits over the standard of appellate review of new trial orders. A number of Circuits have departed from this Court's consistent teachings throughout the years by holding that the Seventh Amendment strictly constrains the district court's discretion to order new trials and requires close appellate scrutiny of new trial orders. Others have not. See Pet. at 24-25.[14]

This conflict continues despite *Gasperini*, whose significance has eluded several Circuits, including the D.C. Circuit. However, several other Circuits have properly interpreted *Gasperini* as conferring substantial discretion on federal trial judges to order new trials for fact-based reasons and restricting appellate review of new trial orders.

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[14]Some scholars believe that this conflict stems from the 1948 revision and recodification of the Judicial Code in which the revisers deleted the longstanding prohibition against appellate reexamination of facts. Some appellate courts interpreted the deletion as giving them substantial power to reexamine facts in all cases, even though the revisers had stated that the deletion was made to preclude the inference that appellate courts could not reexamine facts in non-jury trials.. See Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, Erwin Chemerinsky, Daniel R. Coquillette, Arthur F. McEvoy and Arthur R. Miller, and of Trial Lawyers for Public Justice, as *Amici Curiae* in Support of Petitioner in *William Gasperini v. The Center for Humanities*, No. 95-719, at 23-25 (March 1, 1996).



The significance of *Gasperini* in granting broad discretion to district courts to order new trials and in constraining appellate court review of such orders has been recognized by the Seventh Circuit, which previously had followed a standard similar to the D.C. Circuit's current approach, and the Second, Ninth, and Eleventh Circuits. In *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), the Seventh Circuit applied *Gasperini's* abuse of discretion standard to review a district court's grant of a new trial. In so ruling, the court observed that, prior to *Gasperini*, it had "applied this standard 'somewhat more exacting[ly]' when the district court granted a new trial because of Seventh Amendment considerations." *Id.* at 1397. Given *Gasperini*, however, the court, pursuant to its Circuit Rule 40(e), overruled its prior jurisprudence; abandoned its exacting scrutiny standard of appellate review; and announced that it would review grants of new trials "with somewhat more deference to the district court, utilizing an ordinary abuse of discretion standard . . .." *Id.* at 1397. *See also Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2, 5 (2d Cir. 1996) (ruling, on remand from this Court for reconsideration in light of *Gasperini*, that trial court decisions on new trial motions are subject to review under an abuse of discretion standard); *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981, 993 (9th Cir. 1997) (describing *Gasperini* as holding "that the re-examination clause of the [Seventh Amendment] . . . does not inhibit the power of the trial judge to grant new trials or to order remittitur"), *rev'd on other grounds*, 524 U.S. 214 (1998); and *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1328-29 & 1334-35 (11th Cir.) (citing *Gasperini* and underscoring that appellate courts must defer to trial court orders granting remittiturs or new jury trials, given their unique opportunity to consider the evidence, including the credibility of witnesses), *cert. denied sub*

*nom.*, *Combustion Eng'g, Inc. v. McGill*, 120 S. Ct. 329 (1999).

A number of other Circuits have continued to embrace a strict scrutiny approach after *Gasperini*, but without citing *Gasperini* (or understanding this Court's longstanding jurisprudence). *See Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350, 363 (3rd Cir. 1998) (ruling that "a closer degree of scrutiny" applies to new trial orders); *Brady v. Fort Bend County*, 145 F.3d 691, 713 (5th Cir. 1998) (ruling that standard of appellate review governing denial of motion for new trial is more deferential than standard governing grant of new trial), *cert. denied*, 525 U.S. 1105 (1999); *Holmes v. Massillon, Ohio*, 78 F.3d 1041, 1047 (6th Cir.) (ruling that appellate court "must closely scrutinize the trial court's justifications in order to protect the litigant's right to a jury trial"), *cert. denied sub nom.*, *Fabianich v. Holmes*, 519 U.S. 935 (1996).

Given *Gasperini*, and the historical foundation for affording federal trial court judges substantial discretion in overseeing jury verdicts, this Court must reject the approach of those Circuits applying a strict scrutiny standard in reviewing orders granting new trials because, in the view of the trial judge, the verdict is against the weight of the evidence. As the Eleventh Circuit recently has put it, a district court's authority to order a new trial "is located in the common-law principle, later codified in the Judiciary Act of 1789, that "'[t]rials by jury in civil causes could not subsist now without a power, somewhere, to grant a new trial . . .. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial.'" *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d at 1328, quoting *Bright v. Eynon*, 1 Burr. 390, 393 (K.B. 1757) (Lord Mansfield).



### E. The D.C. Circuit's Approach Conflicts With *Gasperini*, History, And This Court's Antecedent Jurisprudence.

The D.C. Circuit's "more searching inquiry" standard for appellate review of district court decisions granting new trials conflicts with *Gasperini*, this Court's longstanding antecedent jurisprudence, and with history. The D.C. Circuit gave no deference to Judge Robertson's "'unique opportunity to consider the evidence in the living courtroom context'" and he was not "give[n] the benefit of every doubt" in his decision to grant a new trial. *Gasperini*, 518 U.S. at 438, quoting *Taylor v. Washington Terminal Co.*, 409 F.2d at 148, and *Dagnello*, 289 F.2d at 806. Or, as the Seventh Circuit subsequently has stated, "[g]enerally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court." *McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998) (upholding order granting a new trial on damages) (internal quotation marks omitted). Instead, based on its misunderstanding that the Seventh Amendment acts as a restraint on trial, rather than appellate, judges, the D.C. Circuit brushed aside the reasons the trial judge, upon reflection, gave for granting a new trial. In effect, the D.C. Circuit assumed the role of the district court and substituted its judgment for that of Judge Robertson.

First, because the jury had awarded only about half of what Tri County had requested, the D.C. Circuit "question[ed]" the district court's considered judgment that the damages award was excessive. The "rule of thumb" applied by the D.C. Circuit seriously intruded into the district court's analysis of the excessiveness of the award in this case based on the evidence it had heard and the serious flaws in that evidence it had identified.

Second, the D.C. Circuit ruled that the district court had wrongly applied a *per se* rule on the issue whether Tri County had taken reasonable steps to mitigate the damages arising from Cross's suspension of its permit without a hearing. However, although the district court used this language, it did not direct a verdict but simply ordered a new trial. As the district court was well aware, Tri County had failed not only to seek administrative review of Cross's suspension, but even to respond to his post-suspension invitation to be heard. The district court, in the context of striking and excluding health and safety evidence from the case, simultaneously (and inadvertently, we believe) had precluded consideration of Cross's invitation to be heard. The D.C. Circuit misunderstood this point (see *supra* 21 note 6), which was no small matter in a procedural due process case.

Third, in what we believe is an unprecedented step, the D.C. Circuit, as part of its effort to preserve the jury's verdict, elected to review not the district court's ultimate evidentiary rulings but its abandoned trial rulings. On the latter point, the D.C. Circuit ruled that "the district court did not abuse its discretion in excluding the evidence" of health and safety concerns that might have triggered additional regulatory responses or have otherwise allowed the District to rescind its approval of Tri County's building permit. Pet. App. 10. This ruling, however, misses the mark. The issue was not whether the district court's abandoned trial rulings excluding and striking evidence were within its discretion. Instead, the issue was whether, in the living courtroom context, the district court abused its discretion in its post-trial ruling granting a new trial because, in its view, its evidentiary



rulings had unfairly prejudiced the District in the mind of the jury.[15]

Finally, the D.C. Circuit here appeared not to appreciate the narrow scope of the constitutional violation which it had identified in its liability decision -- the temporary suspension of Tri County's building permit without a hearing. Indeed, two days later, a valid stop work order was entered against Tri County for a regulatory violation. *Compare* J.A. 20 & 30 (observing that "all [parties] agree" that "the stop work order . . . was a legally sufficient bar to Tri County's continuing work on the facility" and remanding for consideration of "the possible mooting effect of the stop work order"). In addition, several weeks later, a District adjudicatory body found Tri County guilty of a pre-suspension regulatory violation, which resulted in an independent suspension of its building permit as a matter of law.

In short, under *Gasperini*, the D.C. Circuit's "more searching inquiry" standard is improper when the trial judge grants a new trial "'on the ground that the verdict is against the weight of the evidence.'" Pet. App. 10, quoting *Langevine*, 106 F.3d at 1023. That standard becomes even more improper when it causes an appellate court to review evidentiary rulings abandoned by the trial judge instead of the evidentiary rulings he has concluded, upon reflection, were proper. When a trial judge grants a new trial based, in whole or in part, on a reassessment of his own evidentiary rulings,

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[15]On this point, the D.C. Circuit criticized the District on the grounds that it "never met the trial court's repeated injunction to show how their health and safety issue would have triggered additional regulatory procedures or otherwise allowed the District to rescind its earlier approval." Pet. App. 10. However, the district court re-evaluated that matter after trial in light of the entire case. See also *infra* at 49.

he has concluded that he has disabled the jury from performing its function.

## II. When The Proper Standards Are Applied, Judge Robertson Plainly Did Not Abuse His Discretion In Granting A New Trial.

Application of the proper legal standards to the new trial order here requires affirmance of that order. Damages in this case are governed in large measure by *Carey v. Piphus*, and mitigation-of-damages principles. See Pet. App. 7, 9-10. *Carey v. Piphus* holds that if plaintiffs prove only a procedural violation, they are entitled only to nominal damages unless they can show actual injury caused by the denial of process.[16]

**1. Future Profits.** The district court acted well within its discretion in setting aside the verdict as excessive. Throughout this case, the district court warned Tri County that its evidence of loss of profits was speculative and that its ultimate decision to allow the jury to consider this evidence was conditional. *See, e.g.*, J.A.78 & 121 (citing F. R. Civ. P. 50); see also J.A. 33, citing *Story Parchment Co. v. Patterson Paper Co.*, 282 U.S. 555 (1931). The district court was fully justified.

Tri County's own environmental expert, DiRenzo, completely undermined its claim for future lost profits. DiRenzo testified that competition was vigorous, including competition

[16]Or as the District's trial counsel put it: "And bear in mind that this case is not a traditional compensatory damage case. Mr. Emig filed that in Superior Court. That was dismissed. This is a . . . procedural due process case, so it is a horse of a different color from cases in which someone is injured and they go to damages." J.A. 120.



from bioremediation companies operating on site, and that the revenues that could be charged by Tri County's would-be competitors just covered their operating costs. In his view, Tri County's only potential competitive edge would arise from somewhat lower transportation costs for contaminated soil excavated in the Washington, D.C. metropolitan area. Even this projection was problematic, however, given that competition recently had forced a thermal remediation entrant in Baltimore to lower its prices below operating costs in order to gain market share, a move that quickly forced it to close its doors. By the time of DiRenzo's testimony in 1998, the market for thermal remediation had deteriorated: There were no more thermal remediation facilities in Virginia; the last extant facility had "lost" its permit.

The evidence provided by Tri County's own environmental expert fully justified the district court's conclusion that Tri County's case for future profits, much less whopping future profits, was speculative and that the jury's award in that respect was grossly excessive and thus in violation of the instructions (J.A. 124) the court had given the jury. The district court also wisely concluded that Morse's estimate of revenues and costs was "*pro forma*" and had failed to supply an adequate evidentiary foundation for the jury's verdict. In 1994, for example, Morse projected that Tri County's costs would be $1,335,908 and its profits, $2,031,592.[17]

[17]To be sure, the district court did not spell out in detail its reasoning on this point. However, "[a] trial judge is not required to enter supporting findings of fact and conclusions of law when granting a new-trial motion." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 36 n.3. Furthermore, it should not be assumed that the district court, in its new trial order, "intended to set forth each and every reason for its order." *Id.* at 36 n.3.

Morse's *pro forma* estimate was also contradicted by Tri County's experience on Bryant Street. On Bryant Street, Tri County, far from *receiving* $40 per ton for processing contaminated soil in 1993, *paid* $17.50 per ton for this soil. And, given that only 60% of this soil could be cleaned and resold at $2 per ton (J.A. 44), it is evident, without even considering Tri County's costs for remediating the soil, that Tri County might well have followed the path of the Baltimore facility.

**2. Mitigation.** Judge Robertson ruled that Tri County failed as a matter of law to mitigate damages when, in pursuit of pure economic gain, it did not invest a single penny to seek a hearing even though it claimed that some $11,000,000 in profits were at stake, in addition to its investment. The law is clear that a litigant may not recover damages it reasonably could have avoided and that a litigant who does not make a reasonable effort to minimize damages may be denied damages altogether. *See, e.g., Chesapeake & Ohio R.R. v. Kelly*, 241 U.S. 485, 489 (1916); *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1474-75 (5th Cir. 1991) (plaintiff's damages limited by its failure even to request exception to environmental regulations, even if exception would not have been granted); *Patterson v. Portich*, 853 F.2d 1399, 1408 (7th Cir. 1990); *Tatum v. Morton*, 562 F.2d 1279, 1282-84 (D.C. Cir. 1977); Restatement (Second) of Torts § 918 at 500 (1977). Furthermore, the judge's ruling was closely tied to the facts. He accepted Tri County's argument that a reasonable person would not necessarily expend money to seek a hearing to protect a $500,000 investment; but he also ruled that a reasonable person must be expected to spend some money in order to garner some $11,000,000 in expected profits.

**3. Health and Safety Evidence.** Tri County's position was that the building permit it had received required that it be



given a certificate of occupancy and even precluded the District from making further health and safety inquiries. And it appears that, during trial, the district court accepted this theory. J.A. 76 (stating that he had expected the District to demonstrate that Tri County would have to secure, in addition to an occupancy permit, an operating permit before commencing operation, and would have to show again that the facility would meet health and safety standards). However, in the District, a certificate of occupancy is the operating permit, and an applicant must pass health and safety standards before securing it and any person aggrieved by the issuance of a certificate may challenge it. *See, e.g.*, 11 D.C.M.R. § 3203.1 (June, 1986); *Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985); J.A. 113-14.

In addition, Tri County's President also testified that he had already provided to the District all the information sought in the October 15 letter. However, this was contested. And when the judge struck the safety and health evidence, including the letters of October 15 and December 6, 1993, he disabled the District from showing that it had legitimate concerns in this area and that Tri County had misrepresented the impact of its project on the neighborhood. Indeed, he directed the jury not to consider whether health and safety might properly have interfered with this project. Furthermore, his ruling on this issue may have been interpreted by the jury to mean that the District's post-suspension invitation to be heard was a sham because all relevant matters had been reviewed -- when, in fact, Tri County had misrepresented important facts.

## CONCLUSION

Tri County was not deprived of its Seventh Amendment right to a jury trial by the district court's order granting a new trial. Instead, it received a jury trial in a proceeding that was fair to both sides, and the jury awarded it $100.

The Court should reverse the decision of the D.C. Circuit setting aside the trial court's new trial order, affirm that order, and remand for further proceedings consistent with its decision in this case.

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No. 99-1953

IN THE

# Supreme Court of the United States

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DISTRICT OF COLUMBIA, ET AL.,

*Petitioners,*

v.

TRI COUNTY INDUSTRIES, INC.,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

Did the D.C. Circuit err when it determined by conducting a "more searching inquiry" that the district court abused its discretion in ordering a new trial?

# TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

STATEMENT OF THE CASE ..... 1

I. BACKGROUND ..... 2

II. THE FIRST TRIAL ..... 5

III. POST TRIAL MOTIONS ..... 11

IV. THE SECOND TRIAL ..... 12

V. THE D.C. CIRCUIT'S DECISION ..... 12

SUMMARY OF ARGUMENT ..... 14

ARGUMENT ..... 15

I. DUE TO THE DISTRICT'S FAILURE TO TIMELY RAISE THIS ISSUE, THE D.C. CIRCUIT HAS NEVER EXPLAINED THE SIGNIFICANCE OF CONDUCTING A MORE SEARCHING INQUIRY ..... 15

II. THE MORE SEARCHING INQUIRY BY THE D.C. CIRCUIT DID NOT AFFECT THE VALIDITY OF ITS DECISION ..... 21

A. A More Searching Inquiry May Signify A Closer Review Of The Issues In The Case To Determine Whether The District Court Abused Its Discretion ..... 23

B. A More Searching Inquiry May Also Signify That The Abuse Of Discretion Standard Was Applied More Exactingly Due To Seventh Amendment Considerations ..... 26

III. THE DISTRICT COURT DID ABUSE ITS DISCRETION WHEN IT VACATED THE JURY'S AWARD AND GRANTED A NEW TRIAL ..... 29

IV. IF THIS COURT DETERMINES THAT THE D.C. CIRCUIT EMPLOYED AN ERRONEOUS STANDARD OF APPELLATE REVIEW, THE CASE SHOULD BE REMANDED FOR THE D.C. CIRCUIT TO APPLY THE CORRECT STANDARD OF REVIEW ..... 41

CONCLUSION ..... 41



## TABLE OF AUTHORITIES

Page

**CASES**

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ..... 41

*Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) ..... 21

*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) ..... 24

*Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) ..... 16

*ALPO Petfoods, Inc. v. Ralston Purina Co.*, 997 F.2d 949 (D.C. Cir. 1993) ..... 5

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 41

*Auer v. Robbins*, 519 U.S. 452 (1997) ..... 21

*Barry v. Edmunds*, 116 U.S. 550 (1886) ..... 37

*Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989) ..... 16

*Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983) ..... 20

*Carson v. Polley*, 689 F.2d 562 (5th Cir. 1982) ..... 23

*Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990) ..... 25

*Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916) ..... 33

*City of Springfield v. Kibbe*, 480 U.S. 257 (1987) ..... 15

*Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) ..... 30

*Country Club Assocs. Ltd. Partnership v. FDIC*, 918 F. Supp. 429 (D.D.C. 1996) ..... 6

*Crawford-El v. Britton*, 523 U.S. 574 (1998) ..... 41

*Dagnello v. Long Island R.R. Co.*, 289 F.2d 797 (2d Cir. 1961) ..... 37

*Dimick v. Schiedt*, 293 U.S. 474 (1935) ..... 26, 27

*Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 156 F.3d 190 (D.C. Cir. 1998) ..... 20

*EEOC v. Federal Labor Relations Auth.*, 476 U.S. 21 (1986) ..... 21

*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ..... 31

*Foust v. Munson S.S. Lines*, 229 U.S. 77 (1936) ..... 25

*FTC v. Grolier, Inc.*, 462 U.S. 19 (1983) ..... 21

*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) ..... *passim*

*Grant v. United States Air Force*, 197 F.3d 539 (D.C. Cir. 1999) ..... 20

*Grogan v. General Maint. Serv. Co.*, 763 F.2d 444 (D.C. Cir. 1985) ..... 24

*Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968) ..... 24

*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) ..... 21

*Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ..... 23

*Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir.), *cert. denied*, 519 U.S. 935 (1996) ..... 23

*Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992) ..... 23

*Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87 (D.C. Cir. 1987) ..... 36

*Kennon v. Gilmer*, 131 U.S. 22 (1889) ..... 37

*Koon v. United States*, 518 U.S. 81 (1996) ..... 30, 31

*Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997) ..... 23, 36



*Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960) ..... 23, 28

*Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) ..... 21

*Massey v. Gulf Oil Corp.*, 508 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 838 (1975) ..... 23

*Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) ..... 21

*McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986) ..... 20

*McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) ..... 16

*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988) ..... *passim*

*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) ..... 27

*National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286 (D.C. Cir. 1993) ..... 10

*New York v. Uplinger*, 467 U.S. 246 (1984) ..... 15

*Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) ..... 25

*Patterson v. Portich*, 853 F.2d 1399 (7th Cir. 1988) ..... 33

*Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465 (5th Cir. 1991) ..... 32

*Pullman-Standard v. Swint*, 456 U.S. 273 (1988) ..... 31

*Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380 (7th Cir. 1984) ..... 30

*Salve Regina College v. Russell*, 499 U.S. 225 (1991) ..... 31

*Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227 (D.C. Cir. 1997) ..... 33, 34

*Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238 (7th Cir. 1992) ..... 27

*Synovus Fin. Corp. v. Board of Governors*, 952 F.2d 426 (D.C. Cir. 1991) ..... 10

*Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977) ..... 32

*Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969) ..... 23, 26, 36

*United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) ..... 20

*United States v. Criden*, 648 F.2d 814 (3d Cir. 1981) ..... 30

*United States v. Epstein*, 608 F.2d 1 (D.C. Cir. 1979) ..... 34

*United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) ..... 37

*United States v. Taylor*, 487 U.S. 326 (1988) ..... 24

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*Vander Zee v. Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979) ..... 23

*Weisgram v. Marley Co.*, 528 U.S. 440 (2000) ..... 20

*Wilburn v. Maritrans GP Inc.*, 139 F.3d 350 (3d Cir. 1998) ..... 23

*Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1197 (1997) ..... 34

*Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985) ..... 38-39

*Yee v. City of Escondido*, 503 U.S. 519 (1992) ..... 21

**CONSTITUTION**

U.S. Const. amend. VII ..... *passim*



**STATUTES AND RULES**

42 U.S.C. § 1983 ..... 5

Fed. R. App. P. 28(b)(5) ..... 19

Fed. R. App. P. 40(a)(3) ..... 20

Fed. R. Evid. 103(a) ..... 34

Fed. R. Evid. 403 ..... 37

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11 Charles Alan Wright, *et al.*, Federal Practice and Procedure (2d ed. 1995) ..... 27

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT*

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## OPINIONS BELOW

In addition to the decisions identified by the Petitioners, the January 14, 1997 decision of the United States Court of Appeals for the District of Columbia Circuit (J.A. 18-30) is reported at 104 F.3d 455. The January 17, 1996 decision of the United States District Court for the District of Columbia (J.A. 10-17) is reported at 932 F. Supp. 4.

## STATEMENT OF THE CASE

This lawsuit involves the violation of Tri County's constitutional rights by the District. This determination was made

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* Respondent's Rule 29.6 statement appears in the Brief in Opposition at page i.

by the D.C. Circuit in 1997 and was not appealed further by the District. The question of the actual loss sustained by Tri County as a result of the District's unconstitutional actions, which a jury determined to be $5 million, is the subject of these proceedings.

## I. BACKGROUND.

Tri County replaces underground fuel storage tanks in the Washington metropolitan area. J.A. 39.[1] If the surrounding soil has become contaminated with petroleum from such tanks, Tri County must also excavate and transport the soil to a treatment facility. J.A. 39-40. Tri County removes well over 60,000 tons of contaminated soil per year, but must haul it to other cities due to the unavailability of treatment facilities in the Washington area. J.A. 35, 40.

On June 1, 1992, Tri County leased a 53,000 square foot warehouse ("the Bryant Street warehouse") in an industrial area of northeast Washington, D.C., with the intention of operating its own soil remediation unit[2] inside this building. Pl. Ex. 2, R. 4, 79 (4/14/98).[3] On July 1, 1992, Tri County applied to the District of Columbia Department of Consumer & Regulatory Affairs ("DCRA") for a building permit to operate a soil remediation facility at this location. R. 433 (4/16/98). An extensive governmental review of this project followed, including visits to the site by District regulatory officials. J.A. 8, 9. During this investigation, Tri County informed the District, *inter alia*, that it intended to treat approximately 75,000 tons of contaminated soil per year and

[1] References to "J.A." are to the Joint Appendix, to "Pet." are to the Petition for Certiorari, to "Pet. App." are to the Appendix to the Petition for Certiorari, and to "Rep. Pet." are to the Reply to Brief in Opposition.

[2] This equipment cleans contaminated soil by a thermal process that vaporizes the petroleum contaminants.

[3] References to pages in the Record ("R.") are to the transcript of the first trial, docket entries 111-114.



that the soil would be transported to the facility in covered dump trucks traveling through a commercial and industrial area. J.A. 100, 101. Tri County intended to purchase the same soil cleaning equipment that it had used several years earlier on a temporary basis elsewhere in the city and which had been tested and approved by District regulatory officials at that time. J.A. 40-41.

On December 11, 1992, the District issued an air quality approval to Tri County for this facility. J.A. 126. It prohibited the treatment of hazardous waste material but authorized Tri County to process soil "contaminated with gasoline, diesel oil, fuel oil or kerosene." J.A. 128. On December 22, 1992, Ferial Bishop, the administrator of the District's Environmental Regulation Administration, concluded that an environmental impact statement would not be required since the project would result in no significant environmental impact. J.A. 130. On February 26, 1993, the District issued Tri County a building permit to renovate the "existing warehouse as per plans for industrial process and storage. (Soil Remediation Facility)." Pl. Ex. 5, R. 4, 80-81 (4/14/98). James Sweeney, a DCRA employee, testified that if the contaminated soil was kept inside the warehouse, as Tri County intended, it would have no effect on the surrounding homes and the project would not imminently and substantially affect the public health, safety and welfare. J.A. 97-98.

Tri County then began extensive and costly renovations of this warehouse to accommodate its new business. Under its air quality approval, Tri County was required to test the soil remediation equipment after installation to ensure that it was operating in accordance with approved emission levels. J.A. 127. Accordingly, toward the end of the construction period, Tri County began having contaminated soil transported to the warehouse in anticipation of the delivery and required testing of the soil remediation equipment. J.A. 35, 37-38.

Before the equipment arrived at the site, public opposition to the project surfaced. J.A. 19. On September 20, 1993, a community meeting was held near the proposed site. *Id.* Hampton Cross, the Acting Director of DCRA, and Merrick

Malone of the District's Department of Housing and Community Development ("DHCD"), attended this meeting. J.A. 89 and D.C. Circuit No. 96-7022, Plaintiff's Appendix, A. 142, A. 269. Malone voiced concerns about the effects of Tri County's project on a proposed DHCD project that was purportedly to be constructed adjacent to the Tri County project. *Id.* at A. 143, A. 279-290. Although Malone's information regarding this project was wrong—the area designated for possible redevelopment was over three blocks from the Tri County facility, *id.* at A. 143, A. 291-305—Cross nevertheless relied upon that information and immediately suspended Tri County's building permit. *Id.* at A. 144, A. 311-312. As the D.C. Circuit observed, Cross "pursued no procedure at all to assess whether the alleged change in circumstances materially undermined his agency's prior finding" that the project was not a danger to health and safety. J.A. 29. Without affording Tri County any pre-deprivation or prompt post-deprivation hearing to challenge this indefinite suspension of its permit, the District violated Tri County's procedural due process rights, as the D.C. Circuit held in the first appeal in this case. J.A. 27-30.

When Cross indicated that he could not withdraw this spontaneous suspension, Tri County decided to terminate this project. J.A. 48, 53. An administrative appeal was not feasible due to its indefinite duration, uncertain outcome and continued project costs, which included payment for the soil cleaning equipment to prevent its resale. J.A. 47, 48. In November, 1993, Tri County proceeded to cancel the lease on the Bryant Street warehouse, which was costing $14,000 per month in rent, and thereafter removed the contaminated soil from the building. J.A. 38, 48.

The costs to Tri County of this failed project were enormous. It had spent or incurred costs of $536,421 for professional and consulting assistance in obtaining the permit, lease payments, renovation costs and other project-related expenses. J.A. 36, 132, R. 101 (4/14/98). Tri County was also deprived of the opportunity to earn substantial profits from this project.



## II. THE FIRST TRIAL.

On September 20, 1994, Tri County filed suit against the District of Columbia and its employees seeking damages under 42 U.S.C. § 1983 for the violation of Tri County's due process rights. The district court granted the District's motion for summary judgment and rejected Tri County's constitutional claims. J.A. 2, D.E. 47. On appeal, a panel of the D.C. Circuit, consisting of Chief Judge Edwards and Circuit Judges Williams and Sentelle, held that "Cross's 'procedure' . . . deprived Tri County of property without due process of law." 104 F.3d at 462. The D.C. Circuit described the actions of Cross as "a classic case of shooting from the hip on complex technical matters." *Id.* It also determined that there was "provision for correction of the sort of suspension issued by Cross, but uncertainty as to its likely speed." *Id.* at 461. The case was remanded to the district court for proof of damages sustained by Tri County, as well as consideration of the District's defenses of mootness and failure to mitigate damages. J.A. 29-30.

Prior to trial, Tri County sought summary judgment on its claim for damages. R. D.E. 57 (4/15/97). The district court denied the motion and stated that lost profits of a relatively new business would be speculative. J.A. 33. Its sole authority for this statement was *Country Club Associates Limited Partnership v. FDIC*, 918 F. Supp. 429 (D.D.C. 1996).[4] That case, however, was governed by Virginia law, which bars recovery of lost profits by a new business as a matter of law. The district court was advised that under District of Columbia law, a new business can assert a claim for lost profits. See *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 997 F.2d 949, 951 (D.C. Cir. 1993). At trial, the district court accordingly instructed the jury, without objection by the District, that a new business could recover future profits. J.A. 125.

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[4] The District quotes this portion of the district court's opinion in its brief (p. 7) but omits the reference to *Country Club*. Contrary to its assertion, there was no "pretrial evidentiary ruling." Pet. Br. 8.

During trial, Tri County established that it had incurred $536,421 in costs for this project. J.A. 132. The District did not object to the admissibility of the evidence establishing these costs, did not cross-examine Tri County regarding them and did not present any evidence that questioned the validity or the reasonableness of these expenditures.

Tri County also established that the District's unconstitutional action deprived it of substantial future lost profits. Its president, Glenn Selzer, testified that Tri County could have kept this plant fully operational (processing 75,000 tons of soil per year) with the contaminated soil that it removes from its own projects. R. 131-132 (4/15/98). Vincent DiRenzo, who was recognized without objection as an expert in the field of remediation of soil with petroleum content (J.A. 60), stated that there was sufficient contaminated soil available in the Washington area so that Tri County could have treated 75,000 tons per year from 1994 through 2000. J.A. 62-63. He also testified to the market rate for decontamination of such soil during this same seven-year period. J.A. 62. The District presented no evidence refuting these opinions.[5]

Dr. Joel Morse, a financial economist from the University of Baltimore, was recognized without objection as an expert in his field. J.A. 66. Dr. Morse computed projected revenues for the Tri County facility from 1994 through 2000 based upon the market rates provided by DiRenzo and the anticipated operating costs of the plant. J.A. 67, 139-142, R. 262-263 (4/15/98). The operating costs of the facility were based upon the detailed sworn testimony of six other Tri County witnesses. After adjusting for inflation and present value, Dr.

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[5] In its brief, the District quotes extensively from DiRenzo's written report of March 24, 1995, regarding reduced soil prices and a facility in another city that went out of business. Pet. Br. 7-8. The District itself objected to this report and it was not admitted into evidence. R. 244 (4/15/98). During DiRenzo's testimony, moreover, the District did not question DiRenzo regarding soil prices or the closed competitor and it did not raise such issues to the jury in closing argument.



Morse testified that the total lost profits for 1994 through 2000 amounted to $11,628,174. J.A. 66, 67, 139-142. The District of Columbia did not object to any of this testimony by Dr. Morse.

The District of Columbia presented no evidence during trial indicating that Dr. Morse's method of valuation was improper or unreliable. The District also produced no evidence to refute any of the revenue or cost figures that appeared in Dr. Morse's report.[6] The District never suggested that there were costs associated with this project that were omitted from Dr. Morse's report. The District produced no witnesses to challenge Dr. Morse's opinion of lost profits of $11,628,174 by stating that the figure was either too high or too speculative.

The District did present three defenses to Tri County's claim during trial. First, it argued that Tri County failed to mitigate its damages by not appealing the unconstitutional suspension of its permit. R. 329-330 (4/16/98). Tri County presented testimony that pursuing an administrative appeal was not reasonable in view of the length of time involved (8 to 12 months) (J.A. 54) and the additional costs of approximately $1 million that it would have incurred to keep the project viable during the appeal process. J.A. 47-48. There was also testimony from Cross that the Board of Appeals and

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[6] In a belated effort to discredit Dr. Morse's opinions, the District mistakenly asserts that the five employees assigned to the plant would each work 75 hours per week. Pet. Br. 9. This was an argument that was initially raised before the D.C. Circuit rather than at trial. D.C. Cir. No. 99-7028, Appellee's Brief, 11. Tri County stated that this contention had been waived. *Id.*, Reply Brief, 5, 18. It also responded to the argument by noting that the facility would normally require three persons to operate it. J.A. 57. Five persons were projected as employees so that the additional half shift would be covered without the need for overtime. Dr. Morse's report reflects this fact since the laborers' salaries are based on a 40 hour work week. J.A. 141. See D.C. Cir. No. 99-7028, Reply Brief, 5, 18.

Review, which would have jurisdiction over the appeal, was politically motivated and would act at the direction of the Mayor and Chief of Staff, who were opposed to the continuation of the project. J.A. 53-54, 89-92.

The District also asserted a claim of mootness. R. 473-474 (4/16/98). It alleged that Tri County's building permit was automatically suspended when the company failed to appear for a hearing on October 13, 1993, at the Office of Adjudication. Such hearing had been scheduled to consider the validity of a notice of infraction given to Tri County following an inspector's site visit on September 2, 1993. J.A. 85-86, 88. The infraction notice was for operating a soil remediation business without a certificate of occupancy. J.A. 81. A stop work order for the same violation had also been posted by the District on the property on September 22, 1993. J.A. 83-84. Tri County established that it could have removed the suspension and the stop work order at its discretion simply by paying the fine of $1,525 and by taking away the soil in the warehouse or by obtaining its certificate of occupancy.[7] J.A. 82, 85, 87-89. Tri County believed that the unconstitutional suspension of September 20, 1993, was the major roadblock to the continuation of the project. J.A. 46-47. Until this suspension was lifted, there was no need for Tri County to resolve the stop work order or the October 13, 1993 suspension. J.A. 46-47.

The District's third defense involved the alleged health and safety risks associated with Tri County's project. J.A. 72-73. In its opening statement, the District described these proceedings as "a case in which a community . . . stood up and opposed a project which they felt was detrimental to the health, safety and welfare of the community." R. 69 (4/14/98). The District questioned one of Tri County's

[7] According to the District's own witnesses, a certificate of occupancy was relatively easy to obtain. It would be issued following an inspection to verify that the construction work had been performed in accordance with approved plans and specifications. J.A. 81-83.



witnesses about "health risks associated with the handling and processing of contaminated soil . . . ." R. 214-215 (4/15/98). Tri County objected to the prejudicial aspect of this issue. J.A. 72 and R. 383 (4/16/98). The trial court agreed and advised the District that "you're fighting the last war. Those issues were decided once by the District of Columbia . . . . When they granted the building permit." R. 311-312 (4/15/98), 387, 392 (4/16/98). The court informed the District that "it is conceivable that after hearing the testimony of a witness expressing generalized health and safety concerns . . . I will . . . strike it." J.A. 76. The district court told the District that it had to establish, in addition to health or safety concerns, the existence of a legal mechanism that would have permitted it to stop this project.[8] J.A. 76-77.

Despite the trial court's admonition, the District continued to produce witnesses and exhibits which raised only concerns regarding the safety of the project. The trial court continued to ask the District if it could identify "a legal vehicle in which the community concerns could properly have been considered." R. 384-387 (4/16/98). When it became apparent that such evidence would not be produced, the trial court stated that "[w]hat is still not in the case is . . . that the District of Columbia on health and safety grounds would have ultimately refused permission of this plant to go forward." R. 474 (4/16/98). The trial court then excluded the District's prior testimony regarding the health and safety effects of the project by concluding that such issues had been fully considered and resolved by the permitting process. J.A. 123.

The district court also struck a post-suspension letter dated October 15, 1993, from DCRA to Tri County seeking further information regarding this project. J.A. 145. DCRA employee Sweeney admitted that the information requested in the October 15, 1993 letter would normally have been considered by DCRA during its review of the building permit

[8] The trial court also believed that community opposition alone would not be sufficient to close the project. R. 392 (4/16/98).

application. J.A. 98. Sweeney, however, never asked anyone in DCRA if they had this information before sending this letter to Tri County. J.A. 98-99. Tri County did not respond to this letter since it had already furnished this information. J.A. 50-51. The District was unable to establish any legal authority allowing this request for further information. J.A. 103, 105, 115. See also J.A. 20. The October 15, 1993 correspondence was followed by another letter on December 6, 1993. J.A. 148. This second letter notified Tri County that the failure to respond to the October 15, 1993 letter "constitutes grounds for disapproval of the project." J.A. 149. It also referred to "likely significant adverse environmental impacts on nearby homes" that had not been established by any evidence. J.A. 149. The district court excluded both letters as prejudicial since they purported to suspend Tri County's permit for not responding to a letter that had no legal basis for being sent as well as the unsupported reference to "likely significant adverse environmental impacts on nearby homes." J.A. 119. [9]

[9] Three other new factual issues were raised for the first time during the D.C. Circuit appeal by the District. The first involved DiRenzo's estimate of trucking costs. The only evidence during trial regarding trucking costs was Selzer's testimony of $1.00 per ton. J.A. 42. The District never challenged the reasonableness of this rate during trial. The higher rate in DiRenzo's report was never entered in evidence nor referred to by the District during trial. The District then mentions that the Carter report assumes a production rate of 20 tons per hour, when in fact the plant can treat at least 25 tons of soil per hour. Pet. Br. 9-10. The report used the lower rate as an average in order to reflect 75,000 tons of soil being treated annually. Lodging 17. Lastly, the District refers to the fact that Tri County paid $17.50 per ton to have the soil delivered to the Bryant Street warehouse. This price seems to conflict with Selzer's estimated trucking costs of $1.00 per ton. Tri County argued to the D.C. Circuit that since the District did not raise this issue at trial the matter had been waived based upon *National Federation of Federal Employees v. Greenberg*, 983 F.2d 286, 288-289 (D.C. Cir. 1993), and *Synovus Financial Corp. v. Board of Governors*, 952 F.2d 426, 431 (D.C. Cir. 1991). See



The district court informed the jury that there were four issues in this case: the alleged failure to mitigate damages; the amount spent by Tri County on this project in reliance on its building permit; the amount of lost profits that Tri County sustained; and whether Tri County's claim was moot as a result of the stop work order. J.A. 123-124. The instructions on lost profits were detailed. J.A. 124-125. The jury was instructed that in computing lost profits, it could "consider the uncertainty which makes the success of a new business problematical" as well as "the success or failure of other like businesses." J.A. 125.

The jury deliberated and awarded Tri County $5 million in compensatory damages. Pet. App. 11. In reaching this decision, the jury necessarily rejected the District's factual defenses of mitigation and mootness.

## III. POST TRIAL MOTIONS.

The District filed a "Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial" and asserted its defenses of mootness, failure to mitigate and the speculative nature of Tri County's damages. The Rule 50 motion was denied, but the district court granted a new trial unless Tri County accepted a remittitur of $1 million. Pet. App. 12, 14. Tri County rejected the remittitur.

The Memorandum Order granting the new trial was brief and centered on four issues. Specifically, the district court concluded that: Tri County was unreasonable as a matter of law in not appealing the unlawful suspension of its building permit; its lost profit claim was speculative; the jury verdict for lost profits was grossly excessive and shocked the conscience of the court; and the district court erred in its exclusion of evidence of the likely course of future community

D.C. Cir. No. 99-7028, Reply Brief, 17. It also argued that if such evidence had been presented at trial, there would have been testimony that the $17.50 per ton charge included not only transportation but also excavation and purchase of backfill. *Id.* at 5 n.3.

resistance and regulatory activities with respect to the remediation facility. Pet. App. 12-14.

## IV. THE SECOND TRIAL.

The second trial resulted in a verdict of only nominal damages to Tri County due to erroneous and prejudicial evidentiary rulings. Such rulings were part of the appeal noted by Tri County, but were not considered by the D.C. Circuit since it reinstated the original jury verdict on the ground that the district court abused its discretion in granting a new trial.

## V. THE D.C. CIRCUIT'S DECISION.

A panel of the D.C. Circuit, consisting of Chief Judge Edwards and Circuit Judges Silberman and Henderson, "review[ed] the district court's grant of a new trial for abuse of discretion." Pet. App. 5. See also *id.* at 7, 10. The Court ruled that a more searching inquiry is required when the district court grants a new trial due to the concern that the district court's granting of a new trial might "encroach on the jury's fact-finding function." Pet. App. 5. The D.C. Circuit concluded that the district court "did abuse its discretion," reversed the district court's order that granted a new trial and reinstated the $5 million jury verdict. Pet. App. 10.

The D.C. Circuit rejected the district court's conclusion that Tri County failed to mitigate its damages when it did not seek reinstatement of its suspended building permit. Pet. App. 6-7. In view of Tri County's explanation that the Board of Appeals and Review was politically motivated and that an appeal was too slow and costly, the court held that the evidence presented an issue for the jury concerning "what action was reasonable under the circumstances." Pet. App. 6. The D.C. Circuit concluded that the district court abused its discretion in taking the issue of mitigation of damages away from the jury and deciding it as a matter of law.

The D.C. Circuit also disagreed with the trial court's ruling that as a matter of law Tri County's evidence of lost profits was too speculative and remote. The appellate court, citing Supreme Court precedent, stated that proof of damages may



be based on a reasonable estimate when the defendant has prevented the ascertainment of the amount of damages with certainty. Pet. App. 8. The D.C. Circuit examined the testimony of eight witnesses produced by Tri County and noted that "[t]heir respective opinions were left largely unchallenged by the District." Pet. App. 8. It held that Tri County's estimates of loss were "sufficiently well-founded to avoid characterization as 'mere speculation or guess.' " Pet. App. 9.

The D.C. Circuit then rejected the district court's legal conclusion that the jury award was excessive. The test to be applied was whether the award was "within the 'reasonable range within which the jury may properly operate.' " Pet. App. 9. The D.C. Circuit stated that Tri County presented evidence of costs totaling $536,421 and lost profits of $11,628,174. Pet. App. 9. Since the jury award was less than half of the amount proven at trial, it was within the range of the evidence and should not have been characterized as excessive.

Finally, the D.C. Circuit addressed the trial court's statement that it had erred by not allowing the District to prove the "very real likelihood that the District of Columbia would have closed down the remediation facility . . . or that it never would have been permitted to commence operations at all." Pet. App. 9. The D.C. Circuit disagreed with this erroneous legal conclusion of the district court that was unsupported by the record and placed the blame for lack of such proof squarely on the District. It stated that:

> Despite its reliance on this argument, the District never met the trial court's repeated injunction to show how the health and safety issue would have triggered additional regulatory procedures or otherwise allowed the District to rescind its earlier approval. See J.A. 172; see also *id.* at 168-69, 172-75, 186-87. In short, the District failed to show that community concern would be brought to bear on Tri County's operation, specifically through the regulatory process. Pet. App. 10.

As a result, the district court's decision during trial to strike testimony regarding safety concerns over Tri County's project was not an abuse of discretion because, in addition to being unfairly prejudicial, such issues had already been considered and resolved by the District during the permitting process. Pet. App. 10.

The District then filed a petition for rehearing and, in the alternative, for rehearing *en banc*. It argued for the first time that by conducting a more searching inquiry, the D.C. Circuit applied an overly restrictive standard of review. Both petitions were denied by the D.C. Circuit without explanation. Pet. App. 16-17.

## SUMMARY OF ARGUMENT

The D.C. Circuit has never explained the meaning or effect of conducting a more searching inquiry. The District is unable to establish that this phrase affected the abuse of discretion standard of appellate review, although it had the opportunity to raise this issue with the D.C. Circuit. The writ of certiorari should be dismissed as improvidently granted in view of the uncertainty surrounding a "more searching inquiry."

A more searching inquiry does not have any substantive connotations. It only indicates that the D.C. Circuit conducted a more searching review of the record due to the conflict between the views of the judge and the jury. Such additional review is necessary to make certain that a party has not been deprived of its right to a jury trial.

Even if a more searching inquiry constituted a stricter abuse of discretion standard of review, such action was appropriate. The jury's examination of the facts was entitled to greater deference than the trial judge's review of the evidence. Such greater deference is afforded by a stricter abuse of discretion standard.

Further, the errors committed by the district court were legal in nature. Such erroneous rulings constituted abuse of discretion. Regardless of whether a more searching inquiry



was conducted, the D.C. Circuit was correct in reversing the district court's grant of a new trial under an ordinary abuse of discretion standard.

Lastly, if this Court determines that the D.C. Circuit did apply the wrong standard of review, the case should be remanded for reconsideration especially because the D.C. Circuit never reviewed Tri County's objections to the second trial.

## ARGUMENT

### I. DUE TO THE DISTRICT'S FAILURE TO TIMELY RAISE THIS ISSUE, THE D.C. CIRCUIT HAS NEVER EXPLAINED THE SIGNIFICANCE OF CONDUCTING A MORE SEARCHING INQUIRY.

Although the District had every opportunity below to challenge the use of a "more searching inquiry," it failed to do so until after the court of appeals had issued its opinion. As a result, the D.C. Circuit had no occasion to identify or defend the basis for engaging in such an inquiry, explain what it meant by this phrase, or demonstrate the effect, if any, the inquiry had on its decision. Instead, it simply alluded to a "more searching inquiry" while recognizing abuse of discretion as the standard, and gave no indication of how it applied a more searching inquiry.

This case, therefore, presents a poor vehicle for the Court to consider the validity of the "more searching inquiry" approach. In similar circumstances where the Court is left with insufficient information to evaluate the meaning and effect of the decision below, the Court has found it advisable to dismiss the writ as improvidently granted. See *City of Springfield v. Kibbe*, 480 U.S. 257, 258-259 (1987) (writ dismissed as improvidently granted where question presented was whether municipality could be held liable for inadequate training of employees under negligence standard, but City did not object to jury instruction that negligence would suffice); *New York v. Uplinger*, 467 U.S. 246, 248 (1984) (dismissing the writ because "the opinion of the Court of

Appeals is fairly subject to varying interpretations"); *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16, 16 (1971) (dismissing the writ since "the record does not adequately present" the question on which certiorari was granted). This disposition is particularly appropriate where, as here, the petitioners' failure to join issue below is the cause of the inadequacy of the record. Accordingly, for the reasons explained below, we respectfully submit that the writ should be dismissed as improvidently granted.

The standard of review to be applied by an appellate court when a district court has granted a new trial is abuse of discretion. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36-37 n.3 (1980). The D.C. Circuit expressly applied this standard when it reviewed and set aside the district court's grant of a new trial. It stated on three occasions in its opinion that it reviewed the lower court's decision to award a new trial for an abuse of discretion. Pet. App. 5, 7, 11. While it indicated that in the circumstances of this case it conducted a more searching inquiry as part of its abuse of discretion review, nothing in its opinion gives any indication that the court below ever wavered from an abuse of discretion standard in this case.

On this record, the District itself is left at something of a loss to explain how a more searching inquiry might have been different—let alone erroneously so—from the abuse of discretion review it claims was not conducted.[10] On the one

[10] Without textual support for this contention in the D.C. Circuit's opinion, the District is forced to rely on several lines from the transcript of the oral argument in which one of the judges says there was a rather restrictive standard for taking away a jury verdict and ordering a new trial according to *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988). Pet. 22, n.11. Even assuming that this statement refers to the standard of review used by the appellate court, it is the written opinion that is the final expression of the D.C. Circuit's position. The opinion acknowledges that abuse of discretion is the appropriate standard of appellate review and does not suggest that a harsher abuse of



hand, the District continues to recognize that "the D.C. Circuit ruled that the district court had *abused its discretion* in granting a new trial." Pet. Br. 20 (emphasis added). At the other extreme, the District contends that the court of appeals adopted a "strict scrutiny standard," and used a "strict scrutiny approach." *Id.* at 42. It contends, without express support in the D.C. Circuit's opinion, that the court gave "no deference" to the trial court, *id.* at 43, and took it upon itself to "substitute its judgment" for the trial judge's. *Id.* While the District no doubt believes that the D.C. Circuit overstepped it bounds in this manner, this charge could be leveled by any party when a decision in its favor is reversed under an abuse of discretion standard. The District's *characterization* of the D.C. Circuit's action does not establish the metes and bounds of any "more searching inquiry" or that such an inquiry made a difference in this case.

The simple fact is that the D.C. Circuit's opinion states only that it is applying abuse of discretion review and that it is conducting a more searching inquiry under that review because of the Seventh Amendment interests at stake. It provides no guidance on how this inquiry is applied, how it affects the abuse of discretion review, and how it might have made a difference in this case. There is no suggestion in the D.C. Circuit's opinion that the more searching inquiry was outcome determinative. Thus, both parties as well as the Court are in a poor position to evaluate the propriety of a "more searching inquiry."

On the record of this case, it is hardly surprising that the D.C. Circuit saw no need to defend or explain the "more searching inquiry," because no party objected to the use of

discretion standard of review was employed. The quotation also is not as supportive as the District contends. While counsel for the District was referring to the standard of appellate review, it appears that the D.C. Circuit was referring to the standard that the trial court had to apply to set aside the jury verdict. These are two separate issues and it seems that the parties were talking at cross-purposes.

such an inquiry. Specifically, while it was on notice that a "more searching inquiry" might be used and had ample opportunity to object, the District did not present to the court below any challenge to the use of that inquiry. It is therefore hardly in a position to challenge that inquiry now, particularly where its own acquiescence has resulted in the lack of clarity present here.

When Tri County filed its brief with the D.C. Circuit, it clearly specified that abuse of discretion was the standard of review applicable to this case. In the very first paragraph of the Argument section of its brief—captioned "A. THE FIRST TRIAL–STANDARD OF REVIEW"—Tri County stated that "The trial court's decision to grant a new trial will be given close scrutiny in order to protect the litigant's right to a jury trial." D.C. Cir. No. 99-7028, Appellant's Brief at 30. Tri County cited *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, *supra*, as supporting authority for this approach. *McNeal* states that the granting of a new trial will be reviewed for abuse of discretion, and that "a more searching inquiry is required to prevent the trial court from 'encroach[ing] on the jury's important fact-finding function.'" *Id.* at 646 (citation omitted). Tri County then asserted that abuse of discretion occurs when the district court applies the wrong legal standard or relies on clearly erroneous facts. It proceeded to identify four instances in which the trial court abused its discretion by granting a new trial. At this point, the District was on notice that Tri County wished the D.C. Circuit to conduct "a more searching inquiry" of the record and to conclude that the lower court had abused its discretion in granting a new trial.

In its brief, the District conceded that an abuse of discretion standard applied. D.C. Cir. No. 99-7028, Appellees' Brief at 22. It was, however, completely silent on the appropriateness of a more searching inquiry by the D.C. Circuit. This was the time to state any objection to the use of a more searching inquiry. Given that the "more searching inquiry" standard is the sole basis on which the District petitioned this Court for a writ of certiorari, it is all the more remarkable that the



District failed to object to the D.C. Circuit's well established rule. This may very well be because the District recognized that the inquiry suggested by Tri County did not substantively affect or modify the abuse of discretion standard of appellate review. Of course, had the District genuinely considered the inquiry to result in a different standard of review, as it now contends, then its silence waives its right to press that issue further.[11] Whatever the reason for the District's acquiescence, its silence deprived the court of appeals of an opportunity to defend the standard or even to articulate what the standard meant, which in turn, inhibits this Court from meaningfully reviewing the question on which certiorari was granted.

The District admits that, to the extent that the D. C. Circuit used a stricter standard, it was made aware of that fact at oral argument in the court of appeals. It concedes that "[a]t oral argument, in a colloquy with counsel for the District, the D.C. Circuit underscored the importance of its close appellate scrutiny standard derived from its decision in *McNeal v. Hi-Lo*." Pet. 22, n.11. Shortly after oral argument and before an opinion was issued, the District wrote two letters to the D.C. Circuit in an effort to supplement its argument. J.A. 7, docket entries 11/18/99 & 11/23/99. Neither letter mentioned whether conducting a more searching inquiry affected appellate review for abuse of discretion or objected to such an inquiry.

Not surprisingly, the opinion rendered by the D.C. Circuit adopted the uncontested standard of review that was suggested by the parties: the district court's grant of a new trial was reviewed for abuse of discretion and a more searching inquiry was conducted. Pet. App. 5.

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[11] Rule 28(b)(5) of the Federal Rules of Appellate Procedure required the District to set forth its own statement of the applicable standard of review if it was dissatisfied with Tri County's statement.

The District responded to this unfavorable decision with a petition for rehearing and, in the alternative, for rehearing *en banc*. In its petition, the District argued for the very first time that a more searching inquiry creates a new standard of appellate review and conflicts with *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). The D.C. Circuit denied both petitions without explanation and without even requesting a response from Tri County. See Pet. App. 16-17 and Fed. R. App. P. 40(a)(3).[12]

To the extent that the District contends that *Gasperini* prohibits an appellate court from conducting a more searching inquiry, it had ample opportunity to assert this argument in its brief and elsewhere before the D.C. Circuit issued its opinion. As a result, the D.C. Circuit's denial of the petition for rehearing was entirely proper. See *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 1021 n.11 (2000) ("Nor do we foreclose the possibility that a court of appeals might properly deny a petition for rehearing because it pressed an argument that plainly could have been formulated in a party's brief.")

Because the District failed to question the suitability or meaning of a more searching inquiry, the D.C. Circuit has never been given the opportunity to discuss the overall effect that this phrase had on its opinion. The District does not know if the D.C. Circuit placed any substantive connotations

[12] There is no way of knowing whether the D.C. Circuit thought the District's argument was waived, meritless or immaterial. In prior decisions, the court of appeals has refused to consider issues not raised or discussed by the parties in their initial briefs. See *Grant v. United States Air Force*, 197 F.3d 539, 542 n.6 (D.C. Cir. 1999); *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 156 F.3d 190, 191 (D.C. Cir. 1998); *McBride v. Merrell Dow & Pharms., Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986); *United States v. Byers*, 740 F.2d 1104, 1115-16 n.11 (D.C. Cir. 1984) (claim raised for the first time in a petition for rehearing will not be considered unless there has been a supervening change of fact or law); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).



on a "more searching inquiry." As a result of the District's failure to join issue below, it was not explained in the D.C. Circuit decision and the parties and this Court are now left to speculate on the meaning and effect of a more searching inquiry on the decision of the D.C. Circuit. In these circumstances, the issue should not be reviewed by this Court. See *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.") (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990)); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999); *Auer v. Robbins*, 519 U.S. 452, 464 (1997); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals."); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

## II. THE MORE SEARCHING INQUIRY CONDUCTED BY THE D.C. CIRCUIT DID NOT AFFECT THE VALIDITY OF ITS DECISION.

The District devotes a significant portion of its brief to an historical analysis of the district court's ability to grant a new trial. Pet. Br. 29-40. Tri County does not disagree that a new trial could be granted either in the Eighteenth Century or at the present time when the verdict is against the weight of the evidence or if the damages awarded were excessive.[13] However, the trial court's ability to order a new trial does not imply that an appellate court is prohibited from reviewing its decision for abuse of discretion or from conducting a more

[13] The District also states that the trial court at common law had discretion to grant another trial "on evidentiary grounds" (Pet. Br. at 35-36) or if it "unwisely excluded evidence from the jury's consideration," Pet. Br. at 29, but the authorities cited in the District's brief do not support these assertions.

searching inquiry, which are the issues involved in this case. The historical authorities cited by the District for the proposition that "a district court judge has broad discretion to order new jury trials for a variety of reasons" (Pet. Br. 29) do not address this question. Indeed, as the Court itself recognized in *Gasperini*—at least in the context of *denials* of new trial motions—there was apparently no opportunity for appellate review at common law. See 518 U.S. at 434; *id.* at 443 (Stevens, J., dissenting); *id.* at 452-454 & n.3 (Scalia, J., dissenting). Thus, other than establishing the undisputed point that trial courts have, historically and to the present, enjoyed discretion to award new trials for a variety of reasons, the District's extended historical discussion is largely beside the point.

What is at issue in this case is the propriety of the D.C. Circuit's "more searching inquiry." As we have explained, evaluation of that question is made difficult by the court's failure to explain what that inquiry involved and how it affected its analysis and decision. In the absence of specific guidance from the D.C. Circuit, however, we can discern two possible meanings of the more searching inquiry. The D.C. Circuit could have intended this type of inquiry to be a means of looking more closely than it otherwise would have to determine whether the district court abused its discretion. That the court was engaged in this "closer look" inquiry is supported by both the "more searching" language the court used and its continued reliance on an abuse of discretion standard of review. Alternatively, the D.C. Circuit may have intended its more searching inquiry to involve a more exacting application of an abuse of discretion standard—in effect changing the standard of review—due to Seventh Amendment considerations. While we see no support in the court's opinion for concluding that it changed the standard of review—as opposed to taking a closer look for abuse of discretion—it is such a change that the District attacks here. In any event, for the reasons explained below, either approach is permissible.



### A. A More Searching Inquiry May Signify A Closer Review Of The Issues In The Case To Determine Whether The District Court Abused Its Discretion.

The more searching inquiry approach originated from *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), and has been consistently recognized by the D.C. Circuit since that time.[14] It has also been followed by the Third, Fifth and Sixth Circuits.[15]

In this case, the D.C. Circuit's opinion significantly did not identify this more searching inquiry as a modification of the applicable abuse of discretion standard of review. Nor do any of the prior D.C. Circuit cases that employed a more searching inquiry ever state that under such an inquiry the abuse of discretion standard of review was modified or applied more strictly. Thus, the court's articulation of such an inquiry might suggest only that the appellate court will

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[14] See *Taylor v. Washington Terminal Co.*, 409 F.2d 145, (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969); *Vander Zee v. Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988); *Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992); *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997).

[15] *Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350, 363 (3d Cir. 1998) (reviewing court exercises "closer degree of scrutiny when the district court grants a motion for new trial because it believes the jury's verdict is against the weight of the evidence."); *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 95 (5th Cir.), *cert. denied*, 423 U.S. 838 (1975); *Carson v. Polley*, 689 F.2d 562, 570 (5th Cir. 1982) ("Our review of a district court's decision to grant a new trial is broader than our review of a district court's denied of a new trial, but the standard remains one of abuse of discretion."); *Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir.) (reviewing court must "closely scrutinize" decision to grant new trial on grounds that verdict was against the weight of the evidence), *cert. denied*, 519 U.S. 935 (1996).

consider more closely and in greater detail the record and the issues due to the conflict between the judge and the jury's perception of the case. When a new trial has been granted, an appellate court may have to review questions of whether damages were excessive or whether the verdict was against the weight of the evidence presented. Such review becomes more involved and difficult because of a conflict between the judge and the jury in their view of the case. The appellate court owes deference to the decisions of both the judge and the jury and must resolve this conflict by analyzing the trial more carefully. This necessarily results in a more detailed investigation than when a motion for new trial is denied. In the latter situation, both the judge and the jury have agreed on a particular result and the appellate review becomes more limited due to the considerable deference owed to both the judge and the jury. See *Grogan v. General Maint. Serv. Co.*, 763 F.2d 444 (D.C. Cir. 1985).

This distinction does not imply that appellate review of cases involving denials of new trial motions is perfunctory. "[A] decision calling for the exercise of judicial discretion 'hardly means that it is unfettered by meaningful standards or shielded from *thorough* appellate review.' " *United States v. Taylor*, 487 U.S. 326, 336 (1988) (emphasis supplied) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)). See also *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968), in which a judge's denial of a new trial motion on grounds of excessiveness was to be reviewed for abuse of discretion. In applying this standard, the court of appeals was required to make a "detailed appraisal of the evidence bearing on damages." *Id.* at 156. However, when a new trial is denied, the appellate court's analysis of the trial is aided by the lack of disagreement between the judge and the jury, both of which are entitled to deference by the appellate court. When a new trial has been granted and there is conflict between the judge and the jury, additional appellate scrutiny is required.

A more searching inquiry such as this is appropriate when the trial court sets aside a jury verdict and grants a new trial



because the right to a jury trial has been affected. In *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), which held that the trial judge's increase of a jury award of damages violated the Re-examination Clause of the Seventh Amendment, the Court stated that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." See also *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Foust v. Munson S.S. Lines*, 299 U.S. 77, 84 (1936); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.").

The D.C. Circuit's approach of conducting a more searching inquiry to determine if a trial judge has abused his discretion in setting aside a jury verdict is probably related only to the need to resolve the conflict between the jury and the trial judge rather than to the standard of review. Such closer review is entirely consistent with this Court's directive in *Dimick*. It would reflect a consideration of the right of the jury to assess damages, the discretion that the trial judge has in certain instances to set aside a jury verdict and the requirement of legally sufficient grounds for its nullification by the district court. It would not result in the modification of the abuse of discretion standard of review.

As we understand the District's position, it is not objecting if this is the interpretation that the D.C. Circuit applied to a more searching inquiry. Rep. Pet. 1. The District is seeking abuse of discretion review and received it under this construction of the phrase.

**B. A More Searching Inquiry May Also Signify That The Abuse Of Discretion Standard Was Applied More Exactingly Due To Seventh Amendment Considerations.**

By conducting a more searching inquiry, the D.C. Circuit may have signified that it was applying an abuse of discretion standard more strictly. While this interpretation—*i.e.*, that the range of a trial court's discretion is narrowed—is not in our view apparent from the D.C. Circuit's opinion or its earlier decisions, it is nevertheless a conceivable explanation of the effect of conducting a more searching inquiry. It is, in any event, the possibility of a more searching standard of review that animates the District's case in this Court. Even if such an interpretation were supported, however, it would not be an erroneous standard of appellate review.

In *Taylor v. Washington Terminal Co.*, 409 F.2d at 148, the court stated that "In this jurisdiction particularly, District Court judges have given great weight to jury verdicts." The court noted that in jury trials, deference is due to the trial judge who personally observes the witnesses and considers the evidence. "But against his judgment, we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently." *Id.* Even if one assumes that the D.C. Circuit reviewed the district court's decision under a heightened abuse of discretion standard, it was fully justified in order to protect this constitutional right.

In the context of this case, greater deference because of Seventh Amendment concerns must be given to the jury rather than to the trial judge. As the D.C. Circuit has stated, "where . . . it is clear that the jury has stayed within the reasonable range, the deference due its findings of fact outweighs the deference due the trial judge's first hand review of the evidence." *Id.* at 149. The jury has been given the primary and constitutional responsibility to weigh the evidence, assess credibility and determine the amount of damages. Any interference with this right to have the jury determine the facts by the granting of a new trial can be



reviewed under a stricter abuse of discretion standard. This approach recognizes that when the jury is properly performing its constitutionally assigned function, the trial judge may not intervene into the area of fact finding. *Dimick* very clearly prohibits such curtailment of the jury's delegated powers. By applying the abuse of discretion standard more strictly when a new trial has been granted, an appellate court is indicating that it is extending greater deference to the jury's determination of the facts, rather than to the trial judge.

The District's reliance on *Gasperini* in support of its contrary argument is also misplaced. There, this Court held for the first time that a federal appellate court could review a trial court's *denial* of a motion for new trial based on an allegedly excessive jury verdict. Most circuit courts of appeal had already been reviewing the denial of new trial motions based on a claim of an excessive jury verdict.[16] One of the issues considered in *Gasperini* was whether *any* such appellate review was consistent with the Seventh Amendment. The Court's recognition that some appellate review is available and its endorsement of an abuse of discretion standard when the jury's verdict is *not* thrown out plainly do not foreclose the use of a stricter abuse of discretion standard where the trial court *rejects* the jury's conclusion.

The District also relies on *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), in an effort to establish that greater deference should not be accorded to the jury's findings. In *Medcom*, the Seventh Circuit indicated that prior to *Gasperini*, it applied the abuse of discretion standard " 'somewhat more exacting[ly]' when the district court granted a new trial because of Seventh Amendment considerations." *Id.* at 1397 (quoting *Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238, 247 (7th Cir. 1992)). *Medcom* ended this practice in the Seventh Circuit and reviewed the district court's grant of a motion for new trial on damages "with somewhat more deference to the

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[16] See 11 Charles Alan Wright, *et al.*, Federal Practice and Procedure § 2820, at 209 (2d ed. 1995).

district court, utilizing an ordinary abuse of discretion standard." *Id.* As we have explained, however, *Gasperini* does not address whether an abuse of discretion standard of review may be applied strictly when new trial motions have been granted and thus *Medcom's* supposition that the Seventh Circuit's more exacting inquiry did not survive *Gasperini* does not follow. Apart from its reference to *Gasperini*, *Medcom* fails to set forth any reason for not reviewing a district court's grant of a new trial under a stricter abuse of discretion standard.

The District attacks the possible use of a heightened standard with the facile contention that the Seventh Amendment right to a jury trial is not implicated in the least when a jury verdict is set aside, so long as another jury trial is available. But unless *some* deference is afforded to the first jury verdict, the right to a trial by jury is substantially undercut. Settled legal principles make clear that the result of a jury trial is to be protected and that simply granting another trial is not a panacea for infringement of that right. Thus, for example, it is well settled that a trial court—while possessing substantial discretion to grant new trials—does *not* possess unfettered discretion to do so, as it well could if a new jury trial were a sufficient protection of any Seventh Amendment interest. See *Lind*, 278 F.2d at 88 ("this discretion must still be exercised in accordance with ascertainable legal standards"). Thus, while the District cites Blackstone for the proposition that a second trial yields a more correct result since counsel and the judge are better informed and prepared, Pet. Br. 32-33, Blackstone also indicates that a second jury trial was not always available at the discretion of the court:

> Sufficient grounds must be shown to satisfy them, that it is necessary to justice that the cause should be further considered .... Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probable grounds, to suppose that the merits have not been fairly and fully discussed



> and that the decision is not agreeable to the justice and truth of the case.

Blackstone's Commentaries on the Law, 701-02 (Bernard C. Gavit ed., 1941).

The historical requirement that the original jury verdict not be set aside without adequate grounds implies that it is more significant than getting the issue "right" by another trial. If the focus is only the correctness of the ultimate result, then no limitations would be imposed on the lower court's grant of a new trial. A judge would be able to set aside a jury verdict whenever he believed in his sole discretion that the parties could present a more effective case to a second jury. An initial jury determination would be rendered meaningless if the trial judge could exercise such authority and control.

Therefore, a trial court's disagreement with the jury's verdict quite naturally raises Seventh Amendment concerns about trampling on the right to a jury trial—concerns which are not present when as in *Gasperini*, the trial court upholds the jury's determination and denies a bid for a new trial. As this case came to the D.C. Circuit, therefore, there was a concern that the district court (which had initially thrown out Tri County's suit only to be reversed by the court of appeals) may have infringed Tri County's constitutional right to trial by jury. In an effort to make certain that such interference did not occur, the D.C. Circuit properly employed a "more searching inquiry."

## III. THE DISTRICT COURT DID ABUSE ITS DISCRETION WHEN IT VACATED THE JURY'S AWARD AND GRANTED A NEW TRIAL.

In any event, whether a "more searching inquiry" impermissibly alters the scope of review under the abuse of discretion standard proves largely academic in this case when both the scope of that standard and the nature of the decision at issue are properly understood. This is so because the court of appeals found that each of the four bases upon which the

district court decided to grant a new trial constituted error *as a matter of law.*

The District's brief is largely premised on the supposition that abuse of discretion review is a fixed and definite standard, describing precisely one and only one type of review. It has long been understood, however, that—as Judge Posner has observed—"the words [abuse of discretion] describe a range of standards . . . in which the amount of deference given the trial judge's rulings varies with the nature of the ruling—a range that overlaps clear error, and even error, period." *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 390 (7th Cir. 1984).[17] See also, *e.g., United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981) ("Although the standard of review in such instances is generally framed as 'abuse of discretion,' in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance"); Childress & Davis, Federal Standards of Review § 4.21 at 4-131 (3d ed. 1999) (abuse of discretion has "sliding contextual meaning").

Included in the range of things that might constitute an abuse of discretion are legal errors. As this Court has consistently observed, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *accord Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."); *Gasperini*, 518 U.S. at 448 (Stevens, J., dissenting) ("Indeed, it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion."). Where errors of law are at issue, of course, an appellate court does not have to defer to the district court's resolution, but instead engages in *de novo* review. *Koon*, 518

[17] *Cf. Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1988) (Posner, J.) (discussing arbitrary and capricious standard of review and noting that the standard of review "may be a range, not a point.")



U.S. at 100; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995); *Salve Regina College v. Russell*, 499 U.S. 225, 239-240 (1991). Further, "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

Accordingly, where legal errors are at issue, a "more searching inquiry"—even if otherwise improper by failing to accord the district court an appropriate amount of deference—would not be error because review of legal errors is *de novo* in any event. In other words, a conclusion that the district court abused its discretion by committing legal errors is unaffected by the existence of any "more searching inquiry." As we demonstrate below, in this case the district court's reasons for granting a new trial were wrong as a matter of law, and therefore there was no error in conducting a "more searching inquiry" even if such an inquiry were improper when considering questions of fact or evidentiary weight that led a district court to throw out a jury's determination.

First, the district court committed legal error by concluding that Tri County's lost profit claim was barred as a matter of law. Although the District contended that Tri County failed to mitigate its damages when it opted not to pursue an administrative appeal, the D.C. Circuit indicated that a duty to mitigate is "a question that turns on what action was reasonable under the circumstances." Pet. App. 6 (citations omitted). Even the district court acknowledged in its memorandum order that there was a factual dispute involving the reasonableness of pursuing administrative remedies. The jury properly considered the evidence produced by Tri County that an administrative appeal was too costly and that there were serious questions of the impartiality of the adjudicatory board. The jury, after being fully instructed, decided that the District had not established by a preponderance of the evidence that Tri County had failed to mitigate its damages. Pet. App. 12. Accordingly, it was error as a matter of law for the district court to hold that Tri County was "unrea-

sonable *per se*" in not appealing the suspension. *Id.* That ruling constituted an intrusion by the judge into a strictly factual dispute that the jury had resolved in Tri County's favor. As the D.C. Circuit stated, "it [the district court] abused its discretion in declaring *ex post* that Tri County's failure to pursue administrative remedies to reinstate its permit was *per se* unreasonable, thereby withdrawing the mitigation issue from the jury." Pet. App. 7 (citation omitted).

The cases cited by the District in its brief do not undermine the D.C. Circuit's holding. Pet. Br. 48. In *Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465 (5th Cir. 1991), the district court, following a non-jury trial, determined that the plaintiff failed to mitigate its damages when it did not flare a well and that administrative approval, which was not pursued, would likely have been granted for such action.[18] The appellate court only held that this factual finding was not clearly erroneous. In *Pennzoil*, the trier of fact merely viewed the evidence regarding the efficacy of an administrative appeal differently. There was no attempt by the appellate court to state that administrative appeals must be pursued in all instances or else a party will have failed to mitigate its damages as a matter of law.

Similarly, in *Tatum v. Morton*, 562 F.2d 1279, 1283 (D.C. Cir. 1977), the Court of Appeals clearly stated that "the district court's per se approach—of imposing an absolute duty to mitigate—was not sound." The D.C. Circuit considered the problem to be one of reasonableness. *Id.* at 1284. Since *Tatum* was relied on by the D.C. Circuit in its opinion as authority for the proposition that mitigation was a jury

[18] In an effort to bolster its argument, the District incorrectly cites *Pennzoil* for the proposition that administrative action should be taken "even if exception would not have been granted." Pet. Br. at 48. The district court after trial found just the opposite. The court of appeals stated "the district court noted that exceptions are often granted in emergencies and that an exception would likely have been granted to *Pennzoil*." 943 F.2d at 1476.



issue (Pet. App. 7), it is odd that the District cites the case as supporting authority. Nor are the other two cases relied on by the District apposite. See *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 489 (1916); *Patterson v. Portich*, 853 F.2d 1399, 1408 (7th Cir. 1988). Both merely recognize the unremarkable proposition that a party must exert reasonable efforts to mitigate damages. They have no bearing on the appropriateness of deciding this issue as a matter of law.

The second legal error occurred when the district court concluded that Tri County's proof of lost profits was "too speculative and remote and that it failed to meet the required standard of reasonable certainty." Pet. App. 13. At trial, Tri County established that there was a demand for a soil remediation facility in the Washington area, the capacity of its equipment, the market rate for treating contaminated soil and the operating costs of its facility.[19] All of this evidence was admitted without objection by the District, including the testimony of Dr. Morse that lost profits amounted to $11,628,174.

Because the District never allowed Tri County to start its new business, actual income and expense figures were unavailable. According to *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1234-35 (D.C. Cir. 1997), in this situation "proof of the amount of damages may be based on a reasonable estimate." As the D.C. Circuit observed following its discussion of the witnesses and testimony presented on this issue, "they were sufficiently well-founded to avoid characterization as 'mere speculation or guess.' " Pet. App. 9 (citation omitted).

The legal error consisted of the district court's disregard of the standard applied in the D.C. Circuit for determining

[19] The District's cross examination of witnesses who testified regarding operating costs was practically non-existent. Even though utilities represented approximately 40% of the costs of this project, the District did not ask a single question of the mechanical engineer (Carter) who testified to such costs.

whether damages are speculative and not reasonably certain. "I will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Samaritan Inns*, 114 F.3d at 1235 (citation omitted). As the D.C. Circuit concluded, Tri County's evidence met this standard. By ruling as a matter of law that Tri County's extensive evidence of damages was speculative, the district court was improperly resolving the strictly factual dispute of the amount of damages that had already been considered by the jury, just as it did on the mitigation issue.

In an effort to label the evidence of lost profits as speculative, the District now resorts to an analysis of the evidence. Pet. Br. 46-48. It completely ignores the fact that it failed to object to any of Tri County's evidence of $12 million in damages as being speculative in nature. Since the evidence was admitted it became part of the record to be considered by the trier of fact. See *United States v. Epstein*, 608 F.2d 1, 8-9 (D.C. Cir. 1979); *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1002 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1197 (1997); Fed. R. Evid. 103(a). The fact that DiRenzo, in response to a question from the district court, stated that a Baltimore facility had closed is not particularly probative. The District introduced no evidence regarding the Baltimore facility's operating costs, foreclosing the jury from considering whether that facility's failure was simply a function of a more expensive soil remediation unit, a costlier site location, mismanagement, or inability to get sufficient soil from companies such as Tri County that excavate contaminated soil.[20] These considerations prevent one from drawing the conclusion as a matter of law that Tri County's operation would not have been profitable.

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[20] The unchallenged testimony at trial was that Tri County, as part of its normal operations, produced enough contaminated soil to keep its proposed facility fully operational. Record 131-132 (4/15/98)



Similarly, the closure of a Virginia facility because its permit was withdrawn sheds no light on the question of Tri County's profitability. If anything, given the continuing market for contaminated soil, the closure of two competing facilities would only benefit Tri County. Lastly, while DiRenzo testified that market prices had dropped, he stated without objection that they had leveled off at $32 per ton and anticipated this rate to be constant from 1997-2000. J.A. 62. Dr. Morse's report adjusted the income from the operations based upon these lower market rate projections. J.A. 139.

These factual issues, none of which the District even argued to the jury, demonstrate that the question of damages quite properly belonged to the jury. It was not the type of issue that the district court could resolve as a matter of law. The jury evaluated this testimony, comparing it to the evidence of $12 million in damages from Tri County's witnesses and reached a compromise verdict. The mere existence of a factual dispute over the profitability of a venture does not render Tri County's evidence speculative as a matter of law. While the district court labeled Tri County's proof of future profits a "pro-forma statement of income and expenses" (J.A. 13), there was no evidence that any of the figures in Dr. Morse's report were inaccurate or that items of expense were omitted.

The third legal error committed by the district court involved its description of the portion of the jury award attributable to lost profits ($4.5 million) as grossly excessive.[21] In its D.C. Circuit brief, Tri County argued that the district court committed legal error by determining, despite the applicable

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[21] Usually, excessive verdicts occur when a jury is asked to value intangibles such as pain and suffering and its award is affected by passion or prejudice. In these situations, the trial court's decision to grant a new trial is given deference because it was in a better position to observe if the jury's verdict was improperly influenced by sympathy or prejudice. The nature of Tri County's evidence was different because it established a specific amount of damages for the jury to consider.

legal standard, that the jury's verdict was excessive and shocked the conscience of the court. D.C. Cir. No. 99-7028, Appellant's brief, 44-45. Even though this argument was separately identified in Tri County's brief, the District's brief never responded to it. By not challenging the issue of excessiveness of the verdict before the D.C. Circuit, the District has waived it in these proceedings.

In any event, because Tri County's proof of damages at trial exceeded $12 million, there was no legal basis for the district court to declare as a matter of law that the jury's $5 million verdict was excessive. The reasons given by the district court to support this conclusion were all factual issues—the lack of experience by Tri County, a diminishing market price and the failure of a soil remediation facility in Virginia. Tri County was entitled to have these factual issues resolved by the jury. The district court erred by not following controlling legal precedent which specifies when a jury's award of damages may be set aside on the grounds of excessiveness.

The D.C. Circuit cited *Langevine v. District of Columbia*, 106 F.3d 1018, 1024 (D.C. Cir. 1997), on this issue and quoted a portion of that decision. Pet. App. 9. The language preceding the quotation is also important. It states that "a jury's determination of damages may only be disturbed if it 'is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate' " *Id.* (quoting *Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87, 96 (D.C. Cir. 1987)). The District dismissively refers to this statement as a "rule of thumb" and asserts that it "seriously intruded into the district court's analysis of the excessiveness of the award." Pet. 19; Pet. Br. 43. This statement, however, reflects the law in the D.C. Circuit for at least the past thirty years. See *Taylor v. Washington Terminal Co.*, 409 F.2d at 149. It is an appropriate and well-considered legal definition of "excessive damages," which



the District never challenged before the D.C. Circuit.[22] Since Tri County's evidence of damages exceeded the jury's verdict, the district court's determination that it was excessive constituted legal error. The mere fact that a verdict seemed generous to the district court is an insufficient basis for setting it aside. See *Kennon v. Gilmer,* 131 U.S. 22 (1889); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

The final legal error committed by the district court relates to the question of the District's ability to close this facility. During trial, the district court excluded all testimony regarding community opposition to the project as well as testimony involving its effects on health and safety. Such decision was made for three reasons. First, the District admitted that after an extensive review, Tri County's proposed project would not have a significant environmental impact. Second, testimony of generalized community opposition and potential health effects was extremely prejudicial to Tri County's case. Third, as the D.C. Circuit stated, "[t]he District never met the trial court's repeated injunction to show how the health and safety issue would have triggered additional regulatory procedures or otherwise allowed the District to rescind its earlier approval."[23] Pet. App. 10. In its memorandum

[22] The determination of when damages are excessive is a legal question. See *Gasperini*, 518 U.S. at 435 (" 'but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law' ") (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)); 518 U.S. at 437 n.22 ("Whether damages are excessive for the claim-in-suit must be governed by *some law*.") (emphasis in original).

[23] With respect to this ruling by the trial court, the D.C. Circuit stated that "the district court did not abuse its discretion in excluding the evidence" under Federal Rule of Evidence 403. *Id.* A trial judge has wide discretion in rulings involving Rule 403 because "he is in a superior position to evaluate the impact of the evidence" and his determination will rarely be disturbed on appeal. *United States v. Robinson*, 560 F.2d 507, 514 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).

opinion, the district court attempted to revise this ruling by stating that "I did not permit defendants to prove at trial, that there would be continued community resistance to increased dump truck traffic along Bryant Street . . . and a very real likelihood that the District of Columbia would have closed down the remediation facility . . . or that it would never have been permitted to commence operations at all." Pet. App. 14. This revised view of the trial is not supported by the record. The transcript indicates that the district court's repeated inquiries about a regulatory process to close the Tri County facility went unanswered. This is not a question of the district court restricting proof on this subject. The District was simply unable to articulate, by proffer or by testimony, any means of closing this project. The district court committed legal error by asserting in its memorandum opinion as a basis for granting a new trial that it had wrongfully excluded the District's "evidence" of the likely closure of the Tri County facility. No such evidence existed.

In its brief the District argues that there were three ways in which it could have re-evaluated the safety of this project and rescinded its earlier approval. First, it states that before a certificate of occupancy is issued an applicant must pass certain unspecified health and safety standards. Pet. Br. 49. The only supporting reference given for further health and safety evaluation before a certificate of occupancy is issued is J.A. 113-114. This portion of the joint appendix is merely a non-evidentiary statement of the District's counsel that Tri County still had to test its equipment and obtain a certificate of occupancy. This argument was not supported by any evidence and was contradicted by the District's own witnesses who testified that a certificate of occupancy is granted if the construction work is completed in accordance with the approved plans and specifications. J.A. 81-83. As a result Tri County could have obtained its certificate of occupancy without additional review of the safety of its proposed project.

The District next argues based on *Woodley Park Community Association v. District of Columbia Board of Zoning*



*Adjustment*, 490 A.2d 628 (D.C. 1985), that the community could have challenged the issuance of the building permit. This contention was never before the district court since the District failed to cite *Woodley Park* until the appeal before the D.C. Circuit. Tri County asserted that this argument had been waived. D.C. Circuit No. 99-7028, Reply Brief, 21. During trial there was also no proffer by the District of any community group that was prepared to take legal action to stop this facility so that any such proceedings were entirely speculative. As the district court stated "this is not to say . . . that you may not have an appropriate way to talk about community opposition after the fact, but I don't know what it is yet. I haven't seen the foundation." R. 387 (4/16/98). Further, the building permit had been issued to Tri County on February 26, 1993. When the unconstitutional suspension occurred approximately seven months later, Tri County had expended hundreds of thousands of dollars in reliance on its building permit and its project was close to being operational. *Woodley Park* indicates that any effort by the local community to challenge this project would have been barred by laches.

Lastly, the District states that it could have re-evaluated the project on the grounds of misrepresentation. The District produced no witnesses who testified to the circumstances under which they had regulatory authority to review projects following issuance of a building permit. In any event this project could not have been examined again because the District was not deceived when it issued a building permit to Tri County. It admittedly had conducted a full and extensive review of the project. R. 402-403 (4/16/98). The District also knew exactly where the facility was located with respect to adjoining residences because of its pre-permit inspections of the site that occurred prior to December 11, 1992. See J.A. 8-9. In addition, there was evidence from Sweeney that so long as the soil was kept inside the warehouse, as Tri County intended, it would have no effect on surrounding homes. J.A. 97-98. The District further knew that there would be more than a little employee traffic generated by this facility. In November, 1992 Sweeney was aware that dump

trucks were going to be carrying the soil to the Tri County facility. J.A. 100. The District was aware that Tri County intended to treat 75,000 tons of soil per year at this facility. J.A. 100-101. Under these circumstances the District could not have proved that it was misled when it issued a building permit to Tri County on February 26, 1993 or that there was any basis for re-opening the review process.

As a result, the district court's decision to exclude all evidence of health, safety and community resistance was proper. The alternative was to prejudice Tri County with allegations that might have frightened the jury but would not have prevented the continuation of the project.[24] The district court committed legal error in its memorandum order when it sought to modify this ruling without any factual or legal basis.

Under these circumstances, where the district court has committed legal errors, its decision to grant a new trial deserves no deference by the appellate court. The memorandum opinion was properly reversed by application of an ordinary abuse of discretion standard since it consisted solely of erroneous legal conclusions. The fact that these conclusions were not correct fully justified the D.C. Circuit's reinstatement of the original jury verdict, without regard to the issue of a more searching inquiry.

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[24] The same rationale existed with respect to the exclusion of the two post-suspension letters from the District to Tri County. The District could not establish any legal basis for sending the October 15, 1993 correspondence. The failure to respond to that letter could not justify the suspension contained in the December 6, 1993 letter. To allow the jury to consider these two documents would have created the false impression that Tri County had acted wrongly in not responding to them.



## IV. IF THIS COURT DETERMINES THAT THE D.C. CIRCUIT EMPLOYED AN ERRONEOUS STANDARD OF APPELLATE REVIEW, THE CASE SHOULD BE REMANDED FOR THE D.C. CIRCUIT TO APPLY THE CORRECT STANDARD OF REVIEW.

If this Court should determine that the D.C. Circuit did apply the wrong standard of review, the appropriate course of action would be to remand for reconsideration in light of the correct standard. Contrary to the District's suggestion that this Court should apply any standard in the first instance, Pet. Br. 46-49, the usual course is to permit the lower courts to engage in that task. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). The District has identified no reason not to follow that course here. Such action would be particularly appropriate in this case because the D.C. Circuit would in any event have to consider the issues Tri County raised as errors with respect to the second trial.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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# IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
v.
TRI COUNTY INDUSTRIES, INC.,
*Respondent.*

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

## REPLY BRIEF

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24pp

## TABLE OF CONTENTS

Page


ARGUMENT . . . . . 1

I. THE FRAMERS OF THE SEVENTH AMENDMENT CONTEMPLATED THAT FEDERAL COURTS, WHEN EXERCISING ORIGINAL JURISDICTION, WOULD REEXAMINE FACTS ACCORDING TO THE COMMON LAW. . . . . 1

A. The Common Law in Eighteenth Century England. . . . . 2

B. The First Congress. . . . . 4

II. DESPITE TRI COUNTY'S PROFESSED CONFUSION OVER THE STANDARD USED BY THE D.C. CIRCUIT, ITS BRIEF MAKES CLEAR THAT THE COURT CONDUCTED A *DE NOVO* -- AND THUS IMPERMISSIBLE -- REVIEW OF THE NEW TRIAL ORDER. . . . . 7

III. THIS COURT MUST APPLY THE PROPER STANDARD TO THE FACTS OF THIS CASE. . . . . 14

IV. THERE IS NO BASIS FOR DISMISSING THE WRIT AS IMPROVIDENTLY GRANTED. . . . . 15

V. TRI COUNTY'S OTHER WAIVER ARGUMENTS MUST BE REJECTED. . . . . 18

CONCLUSION . . . . . 20

## TABLE OF AUTHORITIES

### CASES


*Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) . . . . . 14
*Colten v. Kentucky*, 407 U.S. 104 (1972) . . . . . 7
*Dimick v. Schiedt*, 293 U.S. 474 (1935) . . . . . 2
*Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) . 4
*Garrison v. United States*, 62 F.2d 41 (4th Cir. 1932) . . 8
*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*
*Hetzel v. Prince William County*, 523 U.S. 208 (1998) . . 2
*Holmes v. Massillon, Ohio*, 78 F.3d 1041 (6th Cir.), *cert. denied sub nom., Fabianich v. Holmes*, 519 U.S. 935 (1996) . . . . . 16
*Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992) . . . . . 16
*Jackson v. Virginia*, 443 U.S. 307 (1979) . . . . . 14
*Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) . . . . . 17
*Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986) . . . . . 12
*Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960). . . . . 1, 16, 17
*Ludwig v. Massachusetts*, 427 U.S. 618 (1976) . . . . 5, 7
*McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124 (7th Cir. 1998) . . . . . 9
*New York v. Uplinger*, 467 U.S. 246 (1984) . . . . . 18
*Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) . . . . . 2
*United States v. Whern*, 111 F.3d 956 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998). . . . . 19
*Yee v. City of Escondido*, 503 U.S. 519 (1992) . . . . . 19
*Young v. United States*, 315 U.S. 257 (1942) . . . . . 17




### CONSTITUTIONAL AND STATUTORY PROVISIONS


U.S. CONST. Amend. VII . . . . . *passim*
Act of September 24, 1789, ch. 20, 1 Stat. 73-93 . . 4-5, 7


### MISCELLANEOUS


III William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND (1768) (A FACSIMILE OF THE FIRST EDITION OF 1765-1769) (Univ. of Chicago Press (1979)) . . . . . 2-4
Jacob E. Cooke, THE FEDERALIST (Wesleyan University Press 1961) . . . . . 6
Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-91*, 2 U. Chi. L. Sch. Roundtable 161 (1995) . . . . . 7
Fed. R. Civ. P. 50(a) . . . . . 9
Fed. R. Civ. P. 59(d) . . . . . 18
Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771 (1975) . . . . . 14
2 Hale, AN ANALYSIS OF THE CIVIL PART OF THE LAW (5th ed. 1993 reprint) . . . . . 3-4
Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 . . . . . 14
9A McQuillen, MUNICIPAL CORPORATIONS (3d ed. 1990) . . . . . 11
J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (Cambridge University Press 1957) . . . 3
Transcript of Oral Argument in *Gasperini*, 1996 U.S. Trans. Lexis 24, *30 (April 16, 1996) . . . . . 3

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
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## REPLY BRIEF

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### ARGUMENT

### I. THE FRAMERS OF THE SEVENTH AMENDMENT CONTEMPLATED THAT FEDERAL COURTS, WHEN EXERCISING ORIGINAL JURISDICTION, WOULD REEXAMINE FACTS ACCORDING TO THE COMMON LAW.

Tri County pays scant attention to the historical foundation of the Seventh Amendment. As a consequence, its constitutional argument rests on the assumption that the Seventh Amendment is jeopardized whenever a district court judge grants a new jury trial. Citing only *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), Tri County asserts that its position is based on "[s]ettled legal principles . . .." Brief for Respondent ("TCI Brief") 28. However, its position is contradicted by this Court's decisions resting on history (see D.C. Brief 35-39), and, given the language of the Seventh Amendment, history is vitally important.[1]

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[1]In addition, Tri County also relies heavily on *Dimick v. Schiedt*, 293 U.S. 474 (1935), and *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830). See TCI Brief 25, 26 & 27. However, neither case supplies the slightest support for its position.

*Dimick* holds that a federal district court may not, consistently with the Seventh Amendment, award an additur to a plaintiff, with only the

(continued...)

**A. The Common Law in Eighteenth Century England.**

Tri County, citing Blackstone, urges that history "indicates that a second trial was not always available at the discretion of the court." Brief 28. We have not argued otherwise. What is important here, however, is not the truism Tri County sets forth, but ascertainment of the circumstances in which new trials were available under the English common law and the understanding of the framers of the Seventh Amendment with respect to that matter.

In his renowned commentaries, Blackstone made several matters abundantly clear. First, the grant of a new trial in civil cases tried to a jury at the recommendation of the presiding judge, the *nisi prius* judge, was part and parcel of the right to a jury trial. III William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 391 (1768) (A FACSIMILE OF THE FIRST EDITION OF 1765-1769) (Univ. of Chicago Press) (1979)). This power was necessary to ensure the integrity of, and respect for, the jury system itself.[2] Second, history

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[1](...continued)
defendant's consent, without offering plaintiff a new trial. This holding is consistent with the Court's more recent jurisprudence. *See Hetzel v. Prince William County*, 523 U.S. 208 (1998) (federal court may not order remittitur without offering new trial as option). *Dimick* has also been understood as barring additur (*see, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996)), but this understanding is not relevant here. *Parsons*, in turn, which came to this Court on a writ of error to the eastern district of Louisiana, holds that a federal appellate court may not reexamine facts; the Seventh Amendment leaves this task to the district court; and "if there be any mistake of the facts, the court below is competent to address it, by granting a new trial." 28 U.S. at 449.

[2]Sir Matthew Hale, Chief Justice of the King's Bench in the Seventeenth Century, advanced a similar view in his posthumously published 1715 history of the common law. See J.G.A. Pocock, THE ANCIENT
(continued...)



demonstrates that the recommendation of the presiding judge was of considerable importance.[3] Third, there developed under the common law a *practice* of granting new trials for *a variety of reasons*. As Blackstone reported, the *en banc* trial court would award a new trial "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has mis-directed the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the **practice** of the court to

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[2](...continued)
CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 170 (Cambridge University Press 1957). Hale reported that in then-recent years, the courts of law "to forward the ends of justice, [have] become accustomed, on motion, to grant NEW TRIALS, where the jury, or the judge, have been mistaken or misled." 2 Hale, AN ANALYSIS OF THE CIVIL PART OF THE LAW 155 (5th ed. 1993 reprint) (emphasis in original).

[3]The apparent cohesiveness of the *en banc* Westminster courts of law is explained by Hale. Hale reported that the *nisi prius* judges attended the same schools, developed the same values, and discussed their decisions extensively among themselves, a process which meant that "their judgments, and their administrations of common justice, carry a CONSONANCY, CONGRUITY, AND UNIFORMITY, ONE TO ANOTHER: whereby both the laws and the administrations thereof are preserved from that confusion and disparity that would [otherwise] unavoidably ensue . . .." 2 Hale, *supra* at 140 (emphasis in original).

As Justice Scalia's observed in *Gasperini*, 518 U.S. at 456-57, counsel for the Center for Humanities (Theodore B. Olson) was unable to cite a single case in which the full court ordered a new trial without a recommendation of the *nisi prius* judge. See also Transcript of Oral Argument in *Gasperini*, 1996 U.S. Trans. Lexis 24, *30 (April 16, 1996).

award a *new*, or second, *trial*." *Id.* at 387 (bold added; italics in original).[4]

**B. The First Congress.**

Tri County ignores our argument (D.C. Brief 34-35) that the first Congress, which not only enacted the Judiciary Act of 1789, Act of September 24, 1789, 1 Stat. 73, but also approved the Seventh Amendment, was well aware of the basic English framework governing civil actions at law.[5] This framework would have included the role of the common law courts *nisi prius* and their obligation to recommend new trials when the verdict was against the weight of the evidence, when damages were excessive, or when the presiding judge had erred. It is equally clear that the first Congress rejected in some respects the English model, and, in effect, determined "whether particular features of the 18th century common-law jury [were] essential, or merely incidental, to the central

[4]Hale, in turn, reported that, in trials *nisi prius*, "if any surprise happened, either through much business of the court, or through inadvertency of the attorney, or counsel; or through any miscarriage of the jury; or through any other casualty; the party may have his redress . . .." 2 Hale, *supra* at 155. Both Hale and Blackstone thus make clear that a *nisi prius* judge would be justified in recommending a new trial if, for example, he believed that he had misdirected or misguided the jury, a ground that, in our view, would include a decision that he should have permitted the jury to consider evidence he excluded at trial. See also D.C. Brief 31-32. Compare TCI Brief 21 n.13.

[5]As the late Justice Blackmun once wrote, "no citation is needed to establish the impact of Hale and Blackstone on colonial legal thought." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 424 (1979) (concurring in part and dissenting in part).



purpose of the jury trial requirement." *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976).[6]

The first Congress did not establish a judicial structure in which the district court sat *en banc* to review collectively recommendations of its members to grant a new trial. Instead, the first Congress established thirteen judicial districts in the United States and "a District Court" in each of them "to consist of one judge, who shall reside in the district for which he is appointed . . .." § 3, 1 Stat. 73; see also § 2, 1 Stat. 73 (designating the districts). Congress also established three circuit courts, having both original and appellate jurisdiction. § 4, 1 Stat. 74. Each circuit court was composed of two Supreme Court justices and a district judge. § 4, 1 Stat. 74-75. A district judge was barred from voting in any appeal from his own decision "but may assign the reasons of such [sic] his decision." § 4, 1 Stat. 75. The Supreme Court also had both original and appellate jurisdiction. § 1, 1 Stat. 73.

The first Congress also addressed the powers of these courts. The Act provided "[t]hat *all the said courts* of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law . . .." § 17, 1 Stat. 83 (emphasis added). Insofar as appellate review is concerned, the Act provided that "there shall be no reversal in either court [, the Circuit or the Supreme Court,] . . . for any error in fact." § 22, 1 Stat. 84-85. Congress rather conspicuously placed no comparable constraints on the federal courts when exercising their original jurisdiction.

[6]This Court continues to perform this role today. *See, e.g., Gasperini*, 518 U.S. at 436 n.20 (describing permissible departures from English common law civil jury practices).

The conclusion that the Seventh Amendment permits district courts (and superior courts exercising original jurisdiction) to exercise substantial discretion to order new trials in cases tried before juries is reinforced by another consideration. The first Congress was well aware that successive jury trials in the same case were not uncommon on this side of the Atlantic. In Federalist No. 81, Alexander Hamilton wrote that in the New England states, as well as in Georgia, "an appeal from one jury to another is familiar both in language and practice, and is *even a matter of course*, until there have been two verdicts on one side." See Jacob E. Cooke, THE FEDERALIST 550 (Wesleyan University Press 1961) (emphasis added). See also Federalist No. 83, *id.* at 565-66 (describing, *inter alia*, the provision for jury trials in each of the states).[7]

In short, the first Congress plainly contemplated that federal courts exercising original jurisdiction would grant new trials for the reasons new trials were granted under the common law. Just as plainly, this Congress was not disposed to permit appellate courts to reexamine factual matters. The conclusion follows, therefore, that the first Congress did not understand the contemporaneous Seventh Amendment as restricting the power of courts, when acting in a trial capacity, to reexamine facts in jury trials. Instead, as elsewhere in the Constitution, the framers of the Seventh Amendment constructed a wise system of checks and balances. They imposed an important check on the factfinding function of the jury by authorizing, in accordance with the common law, trial court judges to order new trials whenever they were reasonably dissatisfied with an initial jury verdict. This balance was

[7]It is apparent that in New England and Georgia, the people did not regard the first jury in any civil matter as sacrosanct. And Tri County has produced no evidence that the people in any other jurisdiction held a contrary view.



necessary to ensure the integrity of jury verdicts and respect for the jury system itself.[8]

## II. DESPITE TRI COUNTY'S PROFESSED CONFUSION OVER THE STANDARD USED BY THE D.C. CIRCUIT, ITS BRIEF MAKES CLEAR THAT THE COURT CONDUCTED A *DE NOVO* -- AND THUS IMPERMISSIBLE -- REVIEW OF THE NEW TRIAL ORDER.

As the foregoing demonstrates, the founders did not regard the Seventh Amendment as a bar to trial judges granting new jury trials. Indeed, the Seventh Amendment appears not to be implicated by such orders.[9] In these circumstances, the D.C. Circuit's "more searching inquiry" standard of review is misplaced.

The D.C. Circuit's standard does not afford sufficient deference to the district court's unique opportunity to evaluate first-hand the witnesses and other evidence in the context of an ongoing trial. The reasons given by Blackstone and Hale

[8]"The Judiciary Act, largely crafted by Oliver Ellsworth in the Senate, . . . has been called probably the most important and the most satisfactory Act ever passed by Congress." Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-91*, 2 U. Chi. L. Sch. Roundtable 161, 208 (1995) (internal quotation marks omitted).

[9]A new jury trial is a curative even in the criminal context where, unlike the civil context, the double jeopardy clause of the Fifth Amendment also provides protection. In *Ludwig v. Massachusetts*, *supra*, for example, this Court upheld a two-tiered state jury trial system in which a criminal defendant, entitled to a jury trial, could first be required to be tried in a court where no jury trial was available, before gaining a jury trial *de novo*. *See also Colten v. Kentucky*, 407 U.S. 104 (1972) (upholding two-tiered criminal justice system in which a defendant could avoid a first trial without a jury by pleading guilty and then seek a jury trial *de novo*).

for a new trial are precisely the reasons Judge Robertson gave in this case for his order granting a new trial.

In support of the decision of the D.C. Circuit, Tri County cites Chief Judge Posner and urges that the D.C. Circuit found that each basis for the district court's order "constituted error *as a matter of law*." TCI Brief 30 (emphasis in original). This is because, according to Tri County, all of the district court's rulings were "legal errors." *Id.* at 31. See also *id.* at 37 n.22 (omitting from its quotation of *Gasperini* the directive that appellate courts must give the benefit of every doubt to the judgment of the trial judge).

Tri County, however, (Brief 29-40), as well as its *amicus*,[10] confuse the standard for directing a verdict with the standard for granting a new trial. Furthermore, they simply fail to recognize that the district court here ruled that the jury verdict was contrary to the great weight of the evidence.

One classic formulation of the distinction between the two standards is Judge John J. Parker's decision in *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932):

> Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side . . .. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false . . ..

[10]Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Respondent ("ATLA Brief") 18-20.



Given this distinction, a new trial order should not be overturned unless the district court abused its discretion in the true sense of that concept: "where no reasonable person could take the view adopted by the trial court." *McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998) (internal quotation marks omitted). An appellate court does not sit, as Tri County suggests (Brief 24), to referee disputes between juries and trial judges. It should not reexamine the facts *de novo*, and it should not reweigh the evidence. Instead, to avoid running afoul of the Seventh Amendment, an appellate court should reverse only when the district court has made a clear legal error. An appellate court should bear in mind, moreover, that federal district court judges, burdened by crowded dockets, have no incentive to grant new trials and are very unlikely to conclude that they have unduly tipped the scales in favor of one party unless, upon careful examination of the entire record in the case, they are convinced that they have done so.

Here, the district court did not, pursuant to Fed. R. Civ. P. 50(a), enter judgment as a matter of law in favor of the District in any respect. Instead, it merely granted a new jury trial because the evidence demonstrated that the jury's verdict was grossly excessive in light of the evidence the jury considered and because it concluded that it should have permitted the jury to consider additional evidence proffered by the District. In other words, the district court made factual or evidentiary judgments, and the D.C. Circuit should not have overturned those judgments unless no reasonable judge could have taken those views. That is not the case here. To the contrary, when the proper standard is applied, it is plain that the district court did not abuse its discretion and that its new trial order should be sustained on several independent grounds.

First, insofar as lost future profits are concerned, a reasonable judge easily could take the position that the evi-

dence of real market conditions provided by Tri County's own industry expert, Vincent DiRenzo, proved that the market for thermal soil remediation was not particularly profitable. At the time of trial, in 1998, there were no longer any thermal remediation facilities in Virginia; the "disposal facilities that exist[ed were] much less" than in 1994 when he had gathered the data for his report; and a recent entrant in Baltimore was compelled by market forces to charge prices below its operating costs in order to gain market share and quickly went out of business. J.A. 61; see also 60 & 63-64.[11]

There was also a telling disparity between what DiRenzo testified what Tri County could have *charged* at the gate -- $40 per ton of soil -- and Tri County's practice of *paying* some $17.50 per ton at the gate. See L.1-L.7. This unexplained disparity would have eliminated $3,227,500 of revenues in 1994 alone. See J.A. 140. Concomitantly, Tri County's financial expert, Joel M. Morse, included in his spreadsheet DiRenzo's revenue estimates, but simply ignored DiRenzo's finding that revenues were barely covering operating costs. (The transcript does not, of course, reveal Morse's demeanor during his testimony.)[12]

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[11]As early as March, 1995, "soil prices ha[d] dropped to the lowest point to allow for the facilities to cover operating costs." J.A. 137.

[12]Tri County does not address these disparities in its brief. Instead, it asserts that Morse did not omit any costs in his spreadsheet. TCI Brief 35. However, Morse included in costs only one item not associated with the remediation process itself. J.A. 141. That was item 14, "Trucking to facility," in which he listed $82,500 for trucking 82,500 tons of contaminated soil to the facility. J.A. 141. However, Tri County concededly was incurring pre-remediation costs of at least $17.50 per ton for soil. See TCI Brief 10-11 n.9. Furthermore, there were other problems with the costs Tri County supplied to Morse. For example, the utility costs calculated by Donald G. Carter measured energy consumption only for the machine itself

(continued...)



In these circumstances, a reasonable judge could readily dismiss as incredible Morse's projections that Tri County's profits would exceed its costs by more than 150% (*e.g.*, costs of $1,335,908 and pre-tax profits of $2,031,592 in 1994). J.A. 139.

A similar analysis also requires the conclusion that no appellate court could rule that Judge Robertson failed to act as a reasonable judge in ruling that Tri County unreasonably failed to mitigate its damages arising from not being afforded a hearing prior to the temporary suspension of its building permit. Tri County did not invoke *any* administrative process afforded by District law to overturn the decision. Indeed, Tri County did not even respond to Hampton Cross's invitation to be heard. Instead, now as then, Tri County takes the position that Cross's invitation violated local law and thus that it had no obligation to respond. TCI Brief 40 n.24. Tri County cannot have it both ways. It cannot complain about lack of constitutional process and simultaneously spurn an invitation to be heard on the ground that the invitation somehow violated local law.[13] Tri County failed to take even modest steps to

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[12](...continued)
and did not include utility costs for the 53,000 square foot warehouse (TCI Brief 2). J.A. 58-59; L. 17. Nor evidently was Morse provided with any cost estimate for disposing of debris that could not be remediated or soil that could not be sold as clean soil. In 1994, this would have amounted to 37,500 tons of material. J.A. 140-41 (reflecting that in 1994 alone, Tri County would have had to dispose of 7,500 tons of debris and 30,000 tons of soil that could not be sold as clean soil).

[13]Indeed, the way for Tri County to determine whether local law authorized this inquiry was to challenge the suspension of its permit in local fora on local-law grounds. It is hornbook law that material misrepresentations in obtaining a permit are grounds for revoking it. 9A McQuillen, MUNICIPAL CORPORATIONS § 26.212.10 (3d ed. 1990).

seek review although it claimed at trial that the suspension cost it $11,600,000 in virtually certain future profits.

Here, to borrow from Chief Judge Posner, Judge Robertson used a sliding scale to assess mitigation in light of the facts. If it is, indeed, reasonably likely that a project will net some $11,600,000 over a several-year period, a reasonable person would expend considerably more than one-twentieth of this sum to secure the right to build it. On the other hand, as Judge Robertson explained, if the only monies at issue were the costs already incurred, a reasonable person should not be expected to spend more. J.A. 12. *Cf. Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986) ("Except in grudge litigation, no client, however wealthy, pays a lawyer more than a dollar to pursue a dollar's worth of recovery."). The D.C. Circuit overreached in second-guessing this fact-laden judgment.[14]

Third, Judge Robertson again acted as a reasonable trial judge in concluding that a new trial was warranted because he had allowed the jury to consider Tri County's speculative evidence of future profits, but not the District's health and safety evidence. Even DiRenzo had testified that a thermal remediation facility in Virginia recently had not been allowed to renew its permit. J.A. 63. The District had proffered Dr. Alfred Siess. He told the court that Pennsylvania had decided that thermal remediation facilities posed unacceptable health and safety risks; that stack tests can be rigged, by, for example, using soil that has been sitting around for a long time (a point that undermined Tri County's argument that, because its

[14]The reasonableness of the new trial order can be assessed in another way. Had Judge Robertson tried the case himself, made appropriate findings, and drawn the conclusion that Tri County's evidence of future profits was speculative and that it had failed to mitigate its damages given what it claimed was at stake, the D.C. Circuit could not properly have reversed this decision.



unlawful New York Avenue facility had passed a stack test, it necessarily would have passed a stack test on Bryant Street); and that thermal remediation facilities pose serious health and safety risks. J.A. 105-12. This evidence also included the health and safety concerns expressed by District officials, including those in Cross's October 15, 1993, invitation to be heard, and by nearby residents of the Bryant Street facility.

This evidence, and the proffered evidence, were relevant to the issues whether the Bryant Street facility would ever have been allowed to operate under District law and, if a certificate of occupancy had been issued, whether it would have been allowed to continue to operate. Given this, Judge Robertson did not act unreasonably by ruling ultimately that the jury should have been permitted to evaluate this evidence.[15]

The last point is bolstered by the district court's decision to strike Cross's invitation to Tri County to be heard on the grounds that this invitation addressed health and safety concerns. This evidence was independently significant to the mitigation of damages issue. The jury surely must have been confused and misled when instructed not to consider Cross's invitation, and Tri County's refusal to accept it, in this procedural due process case.[16]

[15]Tri County claims that it "could have obtained its certificate of occupancy without additional review of the safety of its proposed project," and that there is no evidence to the contrary. Brief 38. The exact opposite is true, as the D.C. Circuit recognized. Pet. App. 3 n.1. Even Mr. Selzer testified that, before Tri County could secure a certificate of occupancy, it would have to pass a stack test and demonstrate that its project met the conditions of its building permit. J.A. 45-46.

[16]Here, as below, we have addressed only three excessive damages theories because we discern only three in Judge Robertson's decision.

(continued...)

## III. This Court Must Apply The Proper Standard To The Facts Of This Case.

Tri County urges that this Court should decline to decide whether the district court abused its discretion in ordering a new trial in this case and permit the D.C. Circuit to decide this point. We fundamentally disagree. As in many areas, the meaning of a legal standard is illuminated by its application to a particular set of facts. *See, e.g.*, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 576-81 (1985) (determining whether district court's findings of fact were clearly erroneous); *Jackson v. Virginia*, 443 U.S. 307, 324-26 (1979) (determining whether a rational factfinder could have found proof of guilt beyond a reasonable doubt). Not to apply the law to the facts here would provide insufficient direction to the Circuits and give credence to the view that the "rules governing judicial review have no more substance at the core than a seedless grape." Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, 780 (1975).

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[16](...continued)
Judge Robertson did not rule that the $5,000,000 award was excessive when considered in a vacuum without regard to the facts. This may be why Tri County, which detects four such issues, accuses us of having waived an argument. Its approach, and its corollary argument that an appellee must structure its brief to mirror the appellant's brief, should be rejected. Otherwise an appellant may assign as error a ruling that the court below never made and then claim waiver when the other side defends only the rulings the court did make. Under such an approach, waiver could be impermissibly and "endlessly manufactured." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 194.



## IV. There Is No Basis For Dismissing The Writ As Improvidently Granted.

We believe that this Court rejected Tri County's waiver argument when it granted review. Nevertheless, we summarize here the reasons why the District unquestionably and squarely proffered to the D.C. Circuit the usual deferential abuse of discretion standard of review and the D.C. Circuit just as unquestionably and squarely rejected it.

In its opening brief in the D.C. Circuit, Tri County repeatedly stated that the standard of review was abuse of discretion. See Pet. Reply 2-3. And while it mentioned close scrutiny of the record once, it did not identify this formulation as the standard of review, apparently in the belief that this formulation means nothing more than that federal appellate courts should carefully review cases (as, of course, they should). See *id.* at 3 & 3 n.1. In its responsive brief, the District urged that the abuse of discretion standard applied and that, under this standard, a district court "has wide discretion in setting aside a jury verdict where . . . the motion granted is for a new trial . . .." Pet. 11.

At argument, the D.C. Circuit made clear that it would not apply the abuse of discretion standard which both parties had proffered. The court vigorously rejected the District's position that it had to find an abuse of discretion before overturning the new trial order and announced that the Circuit's "very tough standard" for "taking the case from the jury" applied. Transcript of Argument 16 (Nov. 12, 1999); see Pet. 22 n.11 & Pet. Reply 3-4. In its decision, the court expressly applied its "more searching inquiry" standard of review. Pet. App. 5 & 10.

As an alternative basis for dismissing the writ, Tri County argues that the meaning of the standard used by the D.C.

Circuit in this and some of its prior decisions is susceptible of two meanings. One is that an appellate court reviews the record more fully or carefully than usual. (This reflects the understanding of Tri County's briefs below.) The other is that an appellate court expands its scope of review and thereby constricts the district court's customary discretion.

With all due respect, we do not believe that the Circuits are at odds over the manner of their review (how carefully they read the briefs and the record) rather than the substantive standard applicable to their review. And this certainly was not the dispute between the District and the D.C. Circuit in this case.

Instead, as the Circuits have made clear, they have long been divided over the standard of review. Those using a stricter scrutiny standard have done so to protect what they understand to be the Seventh Amendment right to a jury trial; those using a more generous standard have done so in recognition of the broad discretion historically granted trial judges to order new trials in cases tried to juries. See Pet. 24-25 (collecting cases following *Lind* and those rejecting *Lind*). And, the federal courts have no doubt just what the D.C. Circuit's position is.[17] Nor, given its opinion, did the D.C. Circuit in this case. Pet. App. 5

This conflict continues. Some Circuits, acknowledging *Gasperini*, hold that district courts have broad discretion to grant new trials and that appellate review of these orders is

[17]*See, e.g., Holmes v. Massillon, Ohio*, 78 F.3d 1041, 1047 (6th Cir.) (ruling, without citing *Gasperini*, but citing *Lind* and *Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992), that appellate courts "must closely scrutinize the trial court's justifications in order to protect the litigant's right to a jury trial"), *cert. denied sub nom., Fabianich v. Holmes*, 519 U.S. 935 (1996).



correspondingly constrained. See D.C. Brief 41 (collecting cases from the Second, Seventh, Ninth and Eleventh Circuits). By contrast, other Circuits, without acknowledging *Gasperini*, continue to follow the *Lind* approach. See *id.* at 42; *accord* ATLA Brief 8-9.[18]

In any event, even if the precise dimensions of the conflict are uncertain, there can be no question that the federal appellate courts, not to mention the district courts, are at odds over their respective powers in cases in which new jury trials are sought. Accordingly, any ambiguity is a powerful reason for this Court to establish what the standard is and, by application of that standard in this case, to clarify its meaning and the scope of the Seventh Amendment. *See, e.g., Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Young v. United States*, 315 U.S. 257, 259 (1942) (The judiciary's obligation to decide cases in accordance with the law "cannot be left merely to the stipulation of parties.").[19]

[18]For reasons that we do not fathom, both Tri County (Brief 27) and ATLA (Brief 9) suggest that only the Seventh Circuit has interpreted *Gasperini* as invalidating stricter scrutiny of orders granting new trials. They do not even acknowledge the decisions from the other Circuits aligned with the Seventh.

[19]Tri County cites several cases in support of its argument that the Court should dismiss the writ as improvidently granted. Brief 15-16. However, even a cursory review of those cases reveals that they are wholly inapposite. Accordingly, this Court's ordinary rule should apply: "once a case has been briefed, argued, and studied in chambers, sound principles of judicial economy normally outweigh most reasons advanced for dismissing a case." *New York v. Uplinger*, 467 U.S. 246, 250-51 (1984) (Stevens, J., concurring).

In short, the District unquestionably preserved for review the argument that a deferential, not restrictive, abuse of discretion standard of appellate review applied to this case. And just as clearly, the D.C. Circuit, with whatever reasoning it deemed appropriate, rejected the District's position.[20]

## V. Tri County's Other Waiver Arguments Must Be Rejected.

Tri County belatedly raises numerous insignificant waiver claims. It followed the same approach in the D.C. Circuit. In the court below, Tri County did not assign as error in its opening brief that Judge Robertson had violated Rule 59(d) by failing to give it "notice and an opportunity to be heard" before granting the District's "timely motion for a new trial for a reason not stated in the motion." Fed. R. Civ. P. 59(d). Instead, it simply urged that he had abused his discretion. In its Reply Brief, Tri County urged that the District had made arguments on appeal in support of the new trial order it had not made below. J.A. 7. Not until oral argument did Tri County suggest that Judge Robertson had acted on his own, rather than on the District's motion. Transcript of Oral Argument 3 & 5.

The D.C. Circuit, however, decided the case on the merits and thus evidently found Tri County's waiver claims either without merit or untimely, or both. This Court should do the same.

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[20]Tri County speculates that the District's purported waiver caused the D.C. Circuit to deny rehearing and rehearing *en banc*. However, a more reasonable and plausible explanation for its actions was that it understood that there was a square conflict among the Circuits on an issue of great importance that would, and must, be resolved by this Court.



First, appellate courts are free to consider any argument in support of a litigant's claims -- here, the District's defenses of the new trial order. Under *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *See also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988). Second, the District's new trial motion and supporting 24-page memorandum urged that the district court should grant a new trial because the damages award was excessive given Tri County's speculative future profits evidence, its failure to mitigate damages, and the court's exclusion of evidence.[21] Third, Tri County's attempt to raise a new claim at oral argument violated Circuit rules. *See, e.g., United States v. Whern*, 111 F.3d 956, 958 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).[22]

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[21]We brought the motion and the memorandum to the court's attention by letter dated November 18, 1999. J.A. 7. When Tri County had the temerity to yell "foul" and request that this material not be given to the panel, we replied. J.A. 7.

[22]We mention only one other matter. Tri County seems to take the position that a defendant must object to relevant evidence as it is introduced in order to preserve its right to urge that a plaintiff has failed to carry its burden of proof on an issue. TCI Brief 34. This is plainly not the case. Here, moreover, at trial, the District was at a disadvantage because Judge Robertson had earlier indicated that lost profits would be out of the case as too speculative. See D.C. Brief 7, quoting J.A. 7. Nevertheless, the District renewed its objection to *the claim* for lost profits at trial and reminded the court of its earlier ruling. See D.E. 112 at 330-31 ("[I]n the Court's order dated July 25, 1997, the Court determined that the affidavit of plaintiff's environmental experts . . . is insufficient to establish lost profits with reasonable certainty. . . . The record stood yesterday as it stood on July 25, 1997 on that issue, and . . . plaintiff's claim for future [profits] should be dismissed.").

## CONCLUSION

The Court should reverse the decision of the D.C. Circuit; affirm the district court's order awarding the District of Columbia a new trial; and remand the case to the D.C. Circuit for further proceedings consistent with its opinion in this case.

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DEC 13 2000

No. 99-1953

IN THE

# Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,

*Petitioners,*

v.

TRI COUNTY INDUSTRIES, INC.,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia**

## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT


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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT

I. NEW TRIAL ORDERS WHICH OVERTURN JURY VERDICTS WARRANT "MORE SEARCHING INQUIRY" TO PRESERVE THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT ..... 4

A. "More Searching Inquiry" Into a District Court Grant of a New Trial On Grounds That the Jury Verdict is Excessive or Against the Weight of the Evidence Is Consistent With This Court's Approval of Review of New Trial Rulings for Abuse of Discretion ..... 4

B. The Appellate Court's "More Searching Inquiry" Is Consistent With This Court's Admonition To Scrutinize Carefully Any Infringement of the Seventh Amendment Right to Trial By Jury ..... 10

C. Abandonment of the "More Searching Inquiry" Approach Would Not Shield the District Court's Grant of a New Trial from Reversal for Abuse of Discretion. ..... 12

II. APPELLATE REVIEW OF A GRANT OR DENIAL OF A NEW TRIAL BASED ON EXCESSIVENESS OF THE VERDICT REQUIRES THE COURT TO ASCERTAIN WHETHER THE TRIAL JUDGE APPLIED THE CORRECT STANDARD AND

**WHETHER THE AMOUNT WAS ONE THAT A RATIONAL JURY COULD FIND BASED ON THE EVIDENCE BEFORE IT..... 14**

**A. The Trial Judge Erred In Ruling the Verdict Excessive On the Basis of Facts That Were Not Admitted Into Evidence or Considered By the Jury. 15**

**B. The Court of Appeals Properly Found That the District Court Abused Its Discretion In Overturning the Jury's Award As Grossly Excessive Where the Verdict Was One That a Rational Jury Could Find, Based On the Evidence..... 18**

**CONCLUSION ..... 20**



## *TABLE OF AUTHORITIES*

**CASES**

*Ball v. Interoceanica Corp.*, 71 F.3d 73 (2nd Cir. 1995)..... 18
*Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).... 12
*Blunt v. Little*, Fed. Cas. No. 1,578, 3 Mason, 102 (1822) .... 16
*Borras v. Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978) ..... 8
*Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998).... 9
*Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). ..... 6
*Chambers v. Caulfield*, 6 East. 244, 102 Eng. Rep. 1280 (K. B. 1805) ..... 17
*Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990)..... 12
*Colgrove v. Battin*, 413 U.S. 149 (1973) ..... 6
*Crane v. Consolidated Rail Corp.*, 731 F.2d 1042 (2nd Cir. 1984)..... 8, 10
*Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2nd Cir. 1961)..... 7
*Dimmick v. Schiedt*, 293 U.S. 474 (1935)..... 11, 17
*Duncan v. Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied sub nom. Fain v. Duncan*, 389 U.S. 913 (1967)..... 8
*Eastern Natural Gas Corp. v. Aluminum Co. of America*, 126 F.3d 996 (7th Cir. 1997) ..... 19
*Evers v. Equifax, Inc.*, 650 F.2d 793 (5th Cir. 1981)..... 8, 10
*F.L Walz, Inc. v. Hobart Corp.*, 224 Ill. App. 3d 727, 167 Ill. Dec. 42, 586 N.E.2d 1314 (1992)..... 13
*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)..... 6
*Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179 (8th Cir. 1972) ..... 8, 10, 17
*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996)..... passim
*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)..... 11
*Holmes v. City of Massiilon*, 78 F.3d 1041 (6th Cir. 1996)... 9

*Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). .....19
*Jackson v. Virginia*, 443 U.S. 307 (1979).....19
*Jacob v. New York*, 315 U.S. 752 (1943).....11
*Kennon v. Gilmer*, 131 U.S. 22 (1889) .....6
*Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997). .....9, 18
*Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 88 (3rd Cir.), *cert. denied*, 364 U.S. 835 (1960).....8, 15
*Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484 (1939).....11
*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) .....9, 12, 13
*Narcisse v. Illinois Central Gulf R.R. Co.*, 620 F.2d 544 (5th Cir. 1980).....19
*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).....11
*Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) .....6
*Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514 (6th Cir. 1990).....19
*Smith v. Kmart Corp.*, 177 F.3d 19 (1st Cir. 1999) .....18
*Smith v. Wade*, 461 U.S. 30 (1983).....5
*Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238 (7th Cir. 1992).....8
*Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969). .....7, 8, 10
*Tri County Industries, Inc. v. District of Columbia*, 200 F.3d 836 (D.C. Cir. 2000).....4
*TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).....16
*United States v. Laub*, 12 Pet. (37 U.S.), 1 (1838) .....7
*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).....7
*Vander Zee v. Karabatsos*, 589 F.2d 723 (D.C. Cir. 1978). ...4
*Wells Real Estate v. Greater Lowell Board of Realtors*, 850 F.2d 803 (1st Cir. 1988).....9
*Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350 (3rd Cir. 1998) .....9



## CONSTITUTIONAL PROVISIONS

U.S. Const., amend VII. ..... 4 & passim

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Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973) ..... 11

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**On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia**

AMICUS CURIAE BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENT

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of *amicus curiae* briefs have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury, vindication of civil rights protected under federal and state statutes, and in other actions seeking legal redress.

ATLA's mission includes the preservation of the right to trial by jury for all Americans as guaranteed by the Seventh Amendment. Petitioner in this case questions the validity of a federal appellate court's careful scrutiny of new trial orders which overturn jury verdicts. Because ATLA views such scrutiny as a proper and necessary role for the appellate courts, ATLA respectfully submits this brief as *amicus curiae* in support of the Respondent.

## SUMMARY OF THE ARGUMENT

1. The appellate court in this case, reviewing the district court's grant of a new trial based on the excessiveness of the jury's verdict, stated that it undertakes a "more searching inquiry" into such rulings, as distinguished from denials of motions for a new trial.

The appellate court's "more searching inquiry" is not in conflict with this Court's approval of the line of appellate decisions reviewing such new trial rulings under the abuse of discretion standard.

Appellate review of trial court new trial rulings is a fairly recent historical development. At least six circuits have adopted some version of the "more searching inquiry" standard to protect the right to trial by jury. In approving the line of circuit court cases exercising abuse of discretion review of new trial rulings, this Court did not indicate that those circuit cases were inconsistent with its approval.



Moreover, the "more searching inquiry" is consistent with this Court's repeated admonition that, in view of the fundamental importance of the Seventh Amendment right to trial by jury, courts should give "close scrutiny" to any seeming curtailment of that right.

Finally, it does not appear that, even if the court had declined to undertake a "more searching inquiry," the result in this case would have differed. The ordinary abuse of discretion standard employed by the Seventh Circuit, for example, is not equivalent to the lack of appellate review at all.

2. The court of appeals properly applied the well-settled standard of review of new trial orders based on excessiveness which have been used by the circuit courts. Those courts apply a two-step analysis. Courts first inquire whether the trial judge applied the appropriate standard in ruling on the motion for new trial. Second, the appellate court inquires whether the jury verdict was in an amount which a rational jury could find, based on the evidence.

In this case, the district court erred in relying on matters which were not in evidence when determining whether the jury's verdict was excessive. Although the trial judge possesses considerable discretion, the judge may not determine that the jury's verdict is against the great weight of the evidence or grossly excessive by relying upon facts or matters that were excluded from evidence and which the jury did not consider.

The court of appeals applied the appropriate standard for abuse of discretion with respect to the amount of the jury's verdict. Courts have held that denial of a new trial will be upheld -- and grant of a new trial will be reversed as an abuse of discretion -- where the evidence would allow a rational jury to arrive at the verdict. This "rational jury" standard provides an objective check on irrational trial outcomes, and conforms to this Court's announced standard in criminal cases. Its application in this case was proper and appropriate.

## ARGUMENT

### I. NEW TRIAL ORDERS WHICH OVERTURN JURY VERDICTS WARRANT "MORE SEARCHING INQUIRY" TO PRESERVE THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT.

#### A. "More Searching Inquiry" Into a District Court Grant of a New Trial On Grounds That the Jury Verdict is Excessive or Against the Weight of the Evidence Is Consistent With This Court's Approval of Review of New Trial Rulings for Abuse of Discretion.

The appellate court in this case, on appeal from the district court's order granting the District of Columbia's motion for a new trial following a jury verdict, stated that it reviewed the ruling for abuse of discretion. *Tri County Industries, Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000). The court stated that, "because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function,'" it would undertake a "more searching inquiry" than it would employ on appeal from a denial of a new trial. *Id.*, quoting *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978).

In short, the court made clear that the Seventh Amendment matters.[2]

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[2] The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.



Tri County's suit, in the nature of a constitutional tort action, *see Smith v. Wade*, 461 U.S. 30 (1983), sought damages, including the loss of future profits, caused by the District of Columbia's deprivation of its procedural due process rights in suspending its building permit. The jury returned a verdict of $5 million. 200 F.3d at 839-40.

The trial judge determined that the amount of the verdict was grossly excessive, particularly in view of evidence, which the court excluded at trial, suggesting the District might soon have shut down the facility as a result of community resistance. The district court ordered a new trial if Tri County did not agree to remit all but $1 million of the award. Tri County declined. Following the second trial, the court of appeals reversed the order granting a new trial as an abuse of discretion and reinstated the first jury's verdict. *Id.*

The District asserts that the appellate court's "more searching inquiry" conflicts with this Court's decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). In that case, this Court expressly approved the practice that had been adopted by every federal circuit -- that new trial orders may be reviewed by federal appellate courts for abuse of discretion. *Id.* at 436. The District argues that a more searching inquiry conflicts with "two fundamental principles" embodied in the *Gasperini* decision: that appellate review is limited to abuse of discretion and that in conducting such review, appellate courts must "give the benefit of every doubt to the judgment of the trial judge." *Pet. Br.* at 25.

Amicus submits that this Court's decision in *Gasperini* does not require the rejection of a measure of vigilance under the abuse of discretion standard to safeguard Seventh Amendment rights. Indeed, recognizing that at least six of the circuits employed a version of the "more searching inquiry" approach under the abuse of discretion standard, this

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Court's general statement of approval may be seen to encompass that line of decisions.

A brief summary of the historical development of appellate review of such new trial rulings demonstrates the validity of the lower court's position.

The determination of the amount of damages in civil actions has historically been the responsibility of the jury, preserved against judicial intervention by the Seventh Amendment. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998). Federal courts possess no general authority to reduce the amount of a jury's verdict, *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889), and any review of jury verdicts for excessiveness must bear in mind that "the federal courts operate under the strictures of the Seventh Amendment." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 n.26 (1989).

The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." More than a century and a half ago, Justice Story stated that the Re-Examination Clause is a "substantial and independent clause" that is even "more important" than the preceding portion of the Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Re-Examination Clause prohibits "the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

For many years, it was held that district court orders to grant or deny a new trial based on claims of excessiveness were essentially unreviewable at the federal appellate level. In 1838, for example, the Court considered it "a point too well-settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if



at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error." *United States v. Laub*, 12 Pet. (37 U.S.), 1, 5 (1838). As late at 1940, the Court stated rather categorically: "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940).

During the mid-20th Century, that rule changed dramatically as, one by one, the circuit courts adopted the position that such rulings were reviewable under the abuse of discretion standard. *See Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2nd Cir. 1961). Within a few years, the law had changed sufficiently that a court of appeals could say that "it is by now standard doctrine that such orders may be reviewed for abuse of discretion." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 147 (D.C. Cir.), *cert. denied,* 396 U.S. 835 (1969).

In applying this standard, the D.C. Circuit in *Taylor* and many of the circuit courts recognized that the scope of review of denials of new trial was fairly narrow because the trial judge's ruling was in agreement with the jury, which bears the constitutional responsibility for the determination of the amount of damages. However, many courts recognized that a district court order granting a new trial raises the potential for legal error that is not present in the denial of new trial: The trial court may have overstepped its authority, which is restricted by the Seventh Amendment, in overturning the jury's verdict.

To protect the litigants' right to a jury trial, the court stated in *Taylor,* it "becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny." *Taylor v. Washington Terminal Co.,* 409 F.2d 145, 148 n. 13 (D.C. Cir.), *cert. denied,* 396 U.S. 835 (1969).

The *Taylor* court acknowledged it was following the

lead of Third Circuit Judge Biggs, who had explained:

> [Where] the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.

*Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3rd Cir.), *cert. denied*, 364 U.S. 835 (1960).

Other circuits have followed this lead. *See Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2nd Cir. 1984) ("we agree with Chief Judge Biggs [in *Lind*] as to the need of particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence"); *Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. 1981) ("to protect a litigant's Seventh Amendment rights and to prevent improper intrusion on the jury's function . . . somewhat broader review applies to an order granting a new trial as opposed to an order denying such a motion"); *Duncan v. Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied sub nom. Fain v. Duncan*, 389 U.S. 913 (1967); *Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238, 247 (7th Cir. 1992); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972).

The First Circuit appears to hold a similar view. *See Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978) ("an appellate court will exercise 'a closer degree of scrutiny and supervision' where the basis for the new trial is the trial court's evaluation of the weight of the evidence," citing *Lind, Taylor* and *Duncan, supra*). *See also Wells Real*



*Estate v. Greater Lowell Board of Realtors*, 850 F.2d 803, 811 (1st Cir. 1988) (employing stricter standard "where the motion for new trial is made because the jury's verdict allegedly is against the weight of the evidence . . . because a jury's verdict on the facts should only be overturned in the most compelling circumstances.")

Those Courts have generally adhered to this view subsequent to *Gasperini*. *See Wilburn v. Maritrans GP, Inc.*, 139 F.3d 350 (3rd Cir. 1998); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998); *Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir. 1996); *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997).

It is true, as the District states, that the Seventh Circuit has recently modified its view. In *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), the court's entire discussion of this issue is as follows:

> However, in light of the Supreme Court's decision in *Gasperini* that an abuse of discretion standard of review does not violate the Seventh Amendment, 518 U.S. at ___, 116 S.Ct. at 2223-24, we hereby abandon this practice as unnecessary. Although we now review with somewhat more deference to the district court, utilizing an ordinary abuse of discretion standard, we find that the district court did abuse this discretion.

It is not readily apparent what the Seventh Circuit saw in *Gasperini* that would suggest that appellate courts might relax their vigilance against possible intrusions by the district courts into the role of the jury. However, the court stopped far short of the position urged by the District of Columbia in this case: That *Gasperini* forbids appellate courts from undertaking a more searching inquiry into grants of new trials that overturn jury verdicts on the basis of excessiveness.

The decisions of these circuits do not deviate from the

two fundamental principles identified by the District. *See* Pet. Br. at 25. All apply the abuse of discretion standard. In addition, the decisions explicitly emphasize the broad, though not unlimited deference accorded to the trial judge by virtue of the judge's position to observe the trial. *See Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969) (recognizing "deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record"); *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1051 (2nd Cir. 1984)(similar); *Evers v. Equifax, Inc.*, 650 F.2d 793, 797 (5th Cir. 1981); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972).

Nor did the *Gasperini* Court, expressly approving the line of appellate decisions allowing review, indicate that the vigilance exercised by these circuits was at all inconsistent with the Court's own view or that they were excluded from the scope of the Court's approval. *See* 518 U.S. at 435-36.

It can scarcely be argued that *Gasperini* even suggests that appellate courts may not employ particular care in circumstances where the district court might have infringed upon Seventh Amendment rights. The very foundation of the Court's carefully tailored application of state law was that "[t]he Seventh Amendment [bears] on the allocation of trial functions between judge and jury," as well as controlling "the allocation of authority to review verdicts." 518 U.S. at 432.

**B. The Appellate Court's "More Searching Inquiry" Is Consistent With This Court's Admonition to Scrutinize Carefully Any Infringement of the Seventh Amendment Right to Trial by Jury.**

The right of trial by jury in civil cases was vitally important to the colonists, and its absence from the proposed



Constitution nearly led to its rejection. Only a commitment to add a bill of rights, including the right to trial by jury, assured ratification. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-99 (1993); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 667-730 (1973) (reviewing the ratification debates).

The Seventh Amendment right was specifically designed as a check on the power of federal judges. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, C.J., dissenting); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.").

Mindful of this history, this Court has consistently emphasized the fundamental nature of this right and has instructed that "[t]he right of jury trial in civil cases at common law . . . should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 753 (1943). *See also Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

In *Dimmick v. Schiedt*, 293 U.S. 474 (1935), where the Court upheld the authority of federal courts to order remittitur on motions for a new trial based on excessiveness of the jury's verdict, the Court cautioned:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

293 U.S. at 486 (1935). The Court had occasion to repeat and reaffirm this principle in *Beacon Theatres, Inc. v. Westover*,

359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). The court of appeals in this case did no more than heed that admonition.

**C. Abandonment of the "More Searching Inquiry" Approach Would Not Shield the District Court's Grant of a New Trial from Reversal for Abuse of Discretion.**

Finally, it is clear that the District's quarrel with the lower court's decision does not turn on the court's "more searching inquiry." Rather, the District appears to insist that review for abuse of discretion permits virtually no review at all. This is plainly not the import of this Court's decision in *Gasperini*.

For example, it is worth examining the Seventh Circuit's decision in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997), which the District offers as exemplifying the appropriate standard of review pursuant to *Gasperini*. Pet. Br. at 41. The Seven Circuit did abandon its "more exacting" scrutiny of grants of new trials in favor of "somewhat more deference to the district court using an ordinary abuse of discretion standard." 106 F.3d. at 1397. But the court did not place the district court's new trial decision beyond effective appellate review. Indeed, the Seventh Circuit's disposition of that case under "ordinary abuse of discretion" is substantially similar to the D.C. Circuit's disposition in this case.

*Medcom* was a commercial fraud case in which the jury awarded plaintiff damages for lost profits. The district court granted defendant's motion for a new trial on grounds that the calculations of plaintiff's expert witnesses were too high considering the evidence. The court of appeals held that the district court abused its discretion in granting a new trial:

> The jury awarded $3.5 million for Baxter's misrepresentations regarding the content of the domestic library and $2.225 million for Baxter's misrepresentations regarding the September 30, 1986 balance sheet. These figures were less than MHC sought and less than the calculations provided by MHC's experts. They were, however, within the reasonable range of valuations testified to by MHC's experts and Baxter's experts. As the Appellate Court of Illinois has noted, the law does not require
>
> > that a jury verdict must match either of two experts' figures, or a combination of the assumptions. Rather, all the law requires is that the evidence tend to establish, with a fair degree of probability, a basis for the assessment of damages. . . . The ascertainment and assessment of damages is a question of fact for the jury; although the amount may not be speculative, it need not be proved with mathematical certainty. The jury must bring in a verdict within the range of the valuation testimony presented. . . .
> >
> > *F.L. Walz, Inc. v. Hobart Corp.*, 224 Ill. App. 3d 727, 167 Ill. Dec. 42, 47, 586 N.E.2d 1314, 1319 (1992) (citations omitted).
>
> *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d at 1398 (7th Cir. 1997).

Amicus suggests that, even if the court in this case had employed the standard applied in *Medcom*, as the District suggests, Pet. Br. at 41, the outcome would likely have been no different.

Amicus further suggests that an appellate court should look to whether the trial court applied the correct standard to the claim of excessiveness and, if so, whether the award was one that a rational jury could find based on the evidence. Under that standard, the court of appeals properly held that

the district court abused its discretion in granting a new trial.

## II. APPELLATE REVIEW OF A GRANT OR DENIAL OF A NEW TRIAL BASED ON EXCESSIVENESS OF THE VERDICT REQUIRES THE COURT TO ASCERTAIN WHETHER THE TRIAL JUDGE APPLIED THE CORRECT STANDARD AND WHETHER THE AMOUNT WAS ONE THAT A RATIONAL JURY COULD FIND BASED ON THE EVIDENCE BEFORE IT.

Although federal appellate review of new trial rulings based on excessiveness is a comparatively recent development, the circuit courts have applied the abuse of discretion standard in a fairly uniform manner, employing a two-step analysis. First, courts look to whether the trial judge applied the appropriate legal standard, reviewable for error of law. Second, the court reviews the exercise of discretion by determining whether a rational jury could have arrived at the verdict based on the evidence.

One scholar has observed that this development is part of a larger trend among federal appellate courts to exercise a measure of control over trial court decisions that had previously been deemed unreviewable. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial And Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. Rev. 993, 1046 (1986). The standard applied by the courts is a narrow one:

> On appeal, the question is not whether the trial level result is the better or best one but only whether it is a legally permissible one. Review, therefore, is limited to whether the applicable legal principles were identified and applied correctly and whether the findings of ultimate fact exceed the limits of reasonableness.



*Id.* at 999.

### A. The Trial Judge Erred In Ruling the Verdict Excessive On the Basis of Facts That Were Not Admitted Into Evidence or Considered By the Jury.

Under even the most deferential review, a trial court's "discretion must still be exercised in accordance with ascertainable legal standards and if . . . the trial court failed to apply correctly the proper standards, reversal is possible." *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 88 (3rd Cir.), *cert. denied*. 364 U.S. 835 (1960). "Discretionary determinations are also freely reviewable for errors of law, which include the use of an incorrect legal standard in making the discretionary determination." Louis, *supra*, at 1038.

The district court in this case applied an incorrect legal standard in granting the District's new trial motion. The jury returned a verdict for Tri County, awarding $5 million in compensatory damages, including $4.5 million in lost future profits, caused by the District's violation of Tri County's procedural due process rights. The trial judge ruled that there was legally sufficient evidence to sustain the jury's verdict, and so denied defendant's motion for judgment as a matter of law. With respect to lost future profits, however, the trial judge ruled that the jury's verdict was grossly excessive. The district court therefore ordered a new trial unless Tri County accepted a remittitur of the jury's verdict to $1 million. 200 F.3d 839-40.

Judge Robertson made clear that the crucial element in his decision that the verdict was excessive was evidence which he had excluded from trial. The District had argued that, even if Tri County's permit had not been suspended, resistance to the facility by residents of the community would soon have led the District to reverse course. As a result, the district asserted, the facility would not have operated for long, or would not have opened at all. Recognizing the somewhat speculative nature of this argument, the judge

pressed the District for a more concrete showing how community resistance would have caused the District to derail the regulatory approval. The judge excluded the evidence. 200 F.3d at 842

Post-trial, however, the judge stated:

> In addition, the jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience, particularly in view of the realistic prospect, which I did not permit defendants to prove at trial, that there would be continued community resistance to increased dump truck traffic along Bryant Street, where the remediation facility was located, and a very real likelihood that the District of Columbia would have closed down the remediation facility sooner or later in any event, or that it would never have been permitted to commence operations at all.
>
> Accordingly, it is necessary to grant the motion for a new trial.

Pet. App. 13-14.

In short, the judge found the award was against the great weight of the evidence only after adding to the District's side of the scale evidence that was excluded at trial. This, amicus submits, was legal error. "It is a commonplace that a jury verdict must be reviewed in relation to the record before it. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J. concurring).

Moreover, the error was one of constitutional magnitude, amounting to a re-examination of the jury's finding in a manner not in accordance with the common law.

In *Blunt v. Little*, Fed. Cas. No. 1,578, 3 Mason, 102 (1822), Justice Joseph Story held that the authority of trial courts to review jury verdicts for excessive damages and to order remittitur was exercised by the courts at common law.



*See Dimmick v. Schiedt*, 293 U.S. 474, 482 (1935). In describing the common-law rule, Justice Story quoted from *Chambers v. Caulfiela*, 6 East. 244, 102 Eng. Rep. 1280 (K. B. 1805). There, Chief Justice Lord Ellenborough stated:

> [I]f it appeared to us from the amount of the damages given *as compared with the facts of the case laid before the jury*, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury.

6 East. at 256, 102 Eng. Rep. at 1285 (emphasis added).

The District asserts that the appellate court's evaluation of the excessiveness of the verdict, based on the evidence in the case rather than on evidence the judge felt should have been admitted, was "unprecedented." Pet. Br. at 44. To the contrary, it is well settled that the trial court considering a motion for new trial on this ground is limited to the record evidence.

> The judge should determine whether the verdict is consistent with the evidence after considering all of the events of trial. The judge must review the evidence, view all the evidence as a whole, and weigh the relative strengths and weaknesses of the evidence. . . . However, the judge is not permitted to merely substitute his or her judgment and determination of the credibility of witnesses for that of the jury.

James W. Moore, et al., MOORE'S FEDERAL PRACTICE §59.13[2][f][3] (3rd Ed. 1998). Nor are courts, on motion for new trial, free to set aside a jury verdict "because judges feel that other results are more reasonable." *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972) (collecting cases).

It is true that the District fared far better on its second

jury trial of this case. However, "'a trial court should not grant a new trial merely because the losing party can probably present a better case on another trial.'" *Ball v. Interoceanica Corp.*, 71 F.3d 73, 76 (2nd Cir. 1995), quoting MOORE'S FEDERAL PRACTICE, *supra*, at §59.08[2].

**B. The Court of Appeals Properly Found that the District Court Abused Its Discretion in Overturning the Jury's Award As Grossly Excessive Where the Verdict Was One That a Rational Jury Could Find, Based On The Evidence.**

Even where the trial court has applied the correct standard in granting or denying a new trial on the basis of excessiveness, federal appellate courts also review the exercise of the trial court's discretion with respect to the amount of the award. Denial of a new trial will be upheld -- and grant of a new trial will be reversed as an abuse of discretion -- where the evidence would allow a rational jury to arrive at the same verdict.

In this case, having determined that the district court's rulings admitting and excluding evidence were correct, the court determined that the amount of the verdict was within the range supported by the expert testimony and other evidence in the case. 200 F.3d at 842. In so ruling, the court properly applied the standard set forth in *Langevine v. District of Columbia,* 106 F.3d 1018, 1024 (D.C. Cir. 1997):

> [A] jury's determination of damages may only be disturbed if it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.

This "rational jury" standard is widely accepted as the appropriate standard for appellate review of grants or denials of new trials based on excessiveness of the verdict. *See, e.g., Smith v. Kmart Corp.*, 177 F.3d 19, 29 (1st Cir. 1999) ("We



will find an abuse of discretion only if the jury's verdict exceeds any rational appraisal or estimate of the damages that could be based on the evidence before the jury."); *Narcisse v. Illinois Central Gulf R.R. Co.*, 620 F.2d 544, 547 (5th Cir. 1980) (upholding verdict that was "clearly within the universe of possible awards which are supported by the evidence"); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990) ("An abuse of discretion standard applies in reviewing the district court's conditional grant of a new trial, and the jury's verdict should be accepted if it was reasonably reached."); *Eastern Natural Gas Corp. v. Aluminum Co. of America*, 126 F.3d 996, 1000 (7th Cir. 1997) (court "will not set aside a jury verdict if a reasonable basis exists in the record to support the verdict.")

This objective standard of review is substantially similar to this Court's announced standard applicable in criminal cases in *Jackson v. Virginia,* 443 U.S. 307, 324 (1979) (proper inquiry is whether "no rational trier of fact could have" reached the same verdict).

Indeed, as this Court has observed with respect to excessiveness review of jury verdicts:

> Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All of these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia,* 443 U.S. 307, 324 (1979).

*Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

The "rational jury" standard provides an objective standard for reviewing the exercise of discretion by the trial court that does not involve the appellate court in impermissible weighing of the evidence, consideration of

matters outside the record, or imposition of the court's own subjective views regarding the verdict. The court of appeals properly and appropriately applied that standard in this case.

## CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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